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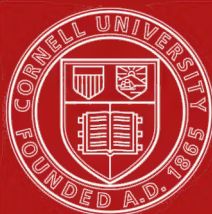
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**The law of collateral and direct inherit**



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# THE LAW

OF

## Collateral and Direct Inheritance, Legacy and Succession Taxes

EMBRACING

ALL AMERICAN AND MANY ENGLISH DECISIONS, WITH  
FORMS FOR NEW YORK STATE, AND AN APPEN-  
DIX GIVING THE STATUTES OF

NEW YORK  
NEW JERSEY  
PENNSYLVANIA  
MASSACHUSETTS  
MAINE

OHIO  
CONNECTICUT  
MARYLAND  
CALIFORNIA  
ILLINOIS

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SECOND EDITION

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AMIN R. KLIN  
BY BENJ. F. DOS PASSOS

Late Assistant District Attorney New York County, N. Y.

ST. PAUL, MINN.  
WEST PUBLISHING CO.

1895

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BY

BENJ. F. DOS PASSOS.

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## PREFACE TO SECOND EDITION.

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Since the publication of the first edition of this work, in September, 1890, the views which I then expressed in the preface and body of the book as to the efficacy of the inheritance tax have been most strongly confirmed.

The apparently direct effect of the publication of the statutes and decisions upon this subject has been to introduce this system of taxation, for the first time, in the states of Maine, Massachusetts, Ohio, Illinois, California, Connecticut, and New Jersey; and the system has also recently been inaugurated in some of the Canadian provinces and in the Australian colonies. In addition to the states just referred to, to-day there are in force, in the following states, statutes directing and enforcing the collection of the collateral or direct inheritance tax, viz.: New York, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, Delaware, and Tennessee. In Minnesota, so anxious were the people to have this system that, when the law enacted by the legislature was declared unconstitutional, the constitution was immediately amended by a provision providing for the passage of a proper law on the subject. It requires nothing more than ordinary perception to foretell the near adoption of these laws in all those states of the Union where they do not now exist.

The successful application of the system has been strongly illustrated in the state of New York, where, until 1890, there existed only a collateral inheritance tax. I then called attention to the importance of a small tax on property passing to lineal or direct heirs, and in 1892 the then

existing law was repealed, and a system adopted imposing a small tax of one per cent. upon lineal heirs and others, and five per cent. upon collaterals. From a financial standpoint, the success of the system of collateral and direct inheritance taxation is most powerfully enforced. In nine years (1885 to 1894) the state of New York has collected, at a very small cost, over \$11,000,000 from this system alone. Of this amount over fifty per cent., or \$6,683,571, was collected in the city of New York, and \$996,272.77 in the county of Kings.<sup>1</sup> The state received from this tax, for the year just closed (September 30, 1895), \$2,126,875, an increase over 1894 of \$437,940.41. The largest amount of transfer taxes was received by the state in 1893, when four estates paid \$1,096,036.97, and fifteen estates paid more than half of the entire amount collected that year. The largest amount received from any single estate in the state of New York, since the law went into effect, is the sum of \$500,000, or thereabouts, which was paid by the estate of Jay Gould.

Much, if not all, of the credit for this condition of the system is due to the Honorable James A. Roberts, state comptroller, and to his deputy, Col. William J. Morgan. Not only has the state comptroller been successful with this tax, but he has also made great progress with the corporation tax, and has thus put the balance on the right side of the "people's ledger."

If we cross the main to Great Britain, we find that the system there is one of the most important in the kingdom. It is also a tax of importance among the other nations of Europe. A large proportion of English revenue is collected from what are commonly called "death duties," consisting of taxes on probates, legacies, successions, and estate duties; and by the "finance act," the latter being a new tax, enacted

<sup>1</sup> Report of James A. Roberts, State Comptroller, Albany, 1895, p. 392

in 1894, a further duty of one per cent. has been imposed upon real estate and personal property of the value of £10,000 and upwards. This revenue has always been large. It is now said to amount to over £11,000,000 annually.<sup>2</sup> But the tax is evidently a great burden, as it falls principally upon land; whereas, under the American statutes, with some exceptions, the tax generally falls upon personalty, which as a rule escapes general taxation. Protest against the English system has recently been made by many prominent Englishmen, notably by the Earl of Winchelsea and Nottingham.<sup>3</sup>

One great fault with the law in New York and some other states is that too many so-called charitable institutions, including religious corporations and many others, are exempted from this tax, especially in New York under an act passed in 1890.<sup>4</sup> By a brief examination of this statute and of the text under the chapter on "Exemptions," this fact will be readily ascertained.<sup>5</sup> These exemptions should be limited to well-defined public charities, and the revenue of the state would largely increase.

Another suggestion occurs in connection with the inheritance tax which may lead to the repeal of the frequently abused personal property tax. This could be accomplished by a small increase in the rate of the inheritance tax. In consideration of this repeal, the state would be justified in dividing some equitable proportion of the inheritance tax among the different counties in proportion to their respective contributions thereto. If this rule were to prevail, the city of New York should have, on certain occasions, a handsome return from the state treasury, and, with this compensation, no regret would be expressed for the repeal of the odious tax on personal property. In the appendix I have included

<sup>2</sup> Chapter 1, § 4, p. 11, note 12.

<sup>3</sup> See North Am. Rev. Jan., 1895, p. 95.

<sup>4</sup> Chapter 553, p. 83.

<sup>5</sup> Page 92 et seq.

the statutes of ten of the most prominent states, with amendments to 1895, viz.: New York, New Jersey, Pennsylvania, Massachusetts, Maine, Ohio, Connecticut, Maryland, California, and Illinois; also, forms for use under the New York statute.

In conclusion I respectfully submit this book to the profession and the public for such just and fair criticism as it may merit.

BENJ. F. DOS PASSOS.

New York City, N. Y., Nov. 1, 1895.



## PREFACE TO FIRST EDITION.

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The subject of general taxation, for state and governmental purposes, forms, undoubtedly, one of the leading questions of the day.

What property, what persons or corporations, shall be taxed; when, where and how taxes shall be levied and collected, are problems which have already consumed much of the time, and perplexed the thoughts of many leading lawyers, statesmen and economists in this country.

But no satisfactory, uniform, logical system has as yet been adopted—I might say, conceived.

Standing alone, as it were, upon its own foundations, based upon grounds incontrovertible, the taxation comprehensively known in this country as the “collateral inheritance tax,” seems to have evoked the sanction of all classes of writers and thinkers who have considered the question.

After a person is dead, and no longer capable of directing or controlling his wealth, the state, in accordance with one of the fundamental principles of social organization, steps in, continues the ownership, and permits the owner to designate either his direct or collateral heirs, or even a total stranger to his blood, to receive his inheritance. Or, if he should die without a written testament, it practically accomplishes the same results through general statutes of descent and distribution, which devolve the property of the intestate upon his direct or collateral heirs.

While it has been stoutly questioned by some theorists, whether, when a man dies, and has neither the power to control nor the necessity to use his property, it should not

wholly revert to the state, the argument cannot be treated as being of much practical importance.

The course of all civilized nations has definitely settled the question in favor of continuing the ownership.

But, as the state becomes the agent, instrument, or power, for distributing the wealth of the deceased, it seems to be conceded, upon the best possible grounds, that, for this service, it should levy a tax upon the property devolving upon the heirs.

While the argument applies almost with equal force to inheritances by *direct* heirs, and it has been so extended in England and by continental nations, in the few American states which have so far adopted this principle of taxation, the legislation has confined the tax to those cases where the property eventually devolves upon *collateral* heirs and *strangers* to the blood, turning over the property, *in solido*, to the direct heirs, unincumbered by any tax.

Considering the support which this tax has received from writers and judges, and the manifestly equitable grounds upon which it rests, it is quite surprising that it has not been adopted in all of the states of the Union. Yet, the fact is, that the collateral inheritance tax exists in about nine states only, all the federal statutes imposing the succession and legacy taxes being repealed. It was first introduced by the legislature of Pennsylvania in 1826. Her example was followed by Louisiana in 1828, where the tax was, however, restricted to alien heirs, and subsequently statutes were passed in Virginia in 1844; North Carolina in 1846; Maryland, 1864; Delaware, 1869; New York, 1885; West Virginia, 1887, and finally in Connecticut in 1889.

But there seems to be little doubt that it will eventually become a law in all of the states.

A careful study of the principles and decisions established by these collateral inheritance tax laws, as well as a somewhat extended practical experience in connection therewith,

convinces me that within a very short period the legislators of the different states will be called upon to consider, *inter alia*, three questions in connection with this tax:

First.—Whether the tax, which is now confined to *collaterals* and *strangers* to the blood, should not be extended to inheritances and distributions to *direct* heirs; whether, in every case, where a person receives property by reason of, or flowing from the death of another, it is not the duty, as well as the policy of the state, to levy a tax upon the inheritance. As I have intimated, the reason of the law applies as forcibly to *direct* as to *collateral* heirs; such a tax has been most successfully imposed in England; it is one easily levied and collected, and if the law be properly administered the tax will produce a very handsome revenue to each of the states that deem it good policy to enact it.

Second.—Another question will relate to exemptions from the tax by ecclesiastical, eleemosynary and charitable institutions. A careful consideration of this subject leads me to believe that such exemptions should be most strictly curtailed and limited, if not altogether abolished by constitutional provision. Practically two states only countenance them, New York and Connecticut. Such exemptions, unless carefully restricted to charities of the almshouse class or for purely public purposes, impair the efficiency and fairness of any system of taxation, and it is probably better that the state should make a direct gift to charitable organizations instead of permitting it to be received in the form of an exemption.

Third.—But the most important question will occur in respect to the *amount* and *manner* of imposing the tax. Should there not be a law creating a graduated or scaling tax, by which the small inheritance shall be made to bear a small burden, and the tax gradually increased, so that when the state comes to the distribution of large estates,

the distributees should be made to pay back to the people a fair and substantial contribution for the protection which the state has afforded the possessors in accumulating and preserving colossal fortunes? A graduated tax would not dwarf individual ambition, genius or exertion, nor could it be successfully maintained that such a change was socialistic or communistic in principle.

The performance of official duties in the district attorney's office of the county of New York in connection with the enforcement of this law, and the fact that no treatise exists on the subject in this country, induced me to believe that I might, in an humble way, perform some service to the public and to the profession by collecting and collating all the various decisions and statutes upon this important subject. This I have conscientiously endeavored to do, and I now respectfully submit my work for fair and legitimate criticism.

BENJAMIN F. DOS PASSOS.

New York, September, 1890.

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# ADDENDA ET CORRIGENDA.

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1. The following cases have appeared since the completion of the text, too late for insertion:

(a) *IN RE SEAMAN'S ESTATE* (N. Y., Oct. 8, 1895) 147 N. Y. 69, 41 N. E. Rep. 401, reversing *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, referred to at page 307 et seq. of the text, was reversed upon the grounds:

(1) That the children of G. took vested interests in the residuary property, both real and personal, at the death of the testator, subject to open and let in after-born children, and to be defeated by death without issue during the running of the life estate.

(2) Subdivision 3 of section 1 of the transfer tax act of 1892, containing the words: "Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act,"—applies to grants or gifts *causa mortis*, but does not embrace or render taxable interests taken under the wills of testators dying before the passage of the act.

(b) *STATE v. FERRIS*, referred to in the text, will be reported in 52 Ohio (when issued), and is reported in the *Northeastern Reporter*, vol. 41, p. 579.

(c) *STATE v. ALSTON*, 94 Tenn. 674, 30 S. W. Rep. 750, upholds the constitutionality of the Tennessee statute (Acts 1893, c. 174; Id. c. 89, § 7), in an interesting opinion by Wilkes, J.: (1) Under the well-established rule that it is a tax upon the privilege or right of succession; (2) that a tax on collateral kindred and strangers, exempting lineal heirs, is valid, and not void for want of uniformity; (3) that the statute is valid as exempting estates of less than \$250.

(d) **INHABITANTS OF ESSEX v. BROOKS** (Mass.) 41 N. E. Rep. 119, holds:

(1) A legatee in a common-law action to recover his legacy may have the question determined whether his legacy is subject to the legacy tax under statute of 1891.

(2) Legacies to towns to establish free public libraries are exempt as being given for use of "charitable or educational institutions."

(e) **PROVINCE'S ESTATE**, 4 Pa. Dist. R. 591:

The adoption of a natural son by an act of the legislature is an act of adoption, and not one of legitimation, and therefore does not exempt the estate passing from the father to such natural son from the collateral inheritance tax.

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ON THE

### INHERITANCE TAX.

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1. The Power of the Legislature over the Subject of Wills, etc. By Judge Thomas, of Penn. Post, p. 6.
2. Limitations of the Amount One may Take by Descent or Will. H. B. Hurd, Esq. Post, p. 6.
3. The Taxing Power; Its Constitutional Limitations, Restraints, and Requirements. Post, p. 30.
4. The Nature and Constitutionality of the Inheritance Tax. 32 Am. Law Reg. (N. S.) 364.
5. Taxation in American States and Cities. R. T. Ely. Post, p. 6.
6. The Inheritance Tax. By May West, N. Y., 1893.
7. Scott's Intestate Laws, Penn., 1871.
8. Hilliard on Taxation, 195.
9. Double Taxation. 5 Political Science Quarterly, Dec., 1890.
10. Exemptions of Religious Corporations. 19 Abb. N. C. 231.
11. Exemption of Public Charities in Penn. By John M. Gest, Esq., post, p. 111 (note); by C. B. Penrose, Esq., post, p. 142 (note).
12. Review of Legislation in Penn. upon Illegitimates. Post, p. 130.
13. Article on Nonresidents, etc. By John A. McCarthy, Esq. 32 Am. Law Reg. (N. S.) April, 1893, p. 365.
14. Collateral Inheritance Tax in Connection with Transfers of Stocks and Loans by Foreign Executors, etc. By H. Blanc, Esq. 45 Alb. Law Jour., April 16, 1892, p. 331.
15. Collateral Inheritance Tax; Conversion of Land Outside of State. By H. W. Page, Esq. 32 Am. Law Reg. (N. S.) 472.

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18. Note on Contingent Remainders. By A. Abbott, Esq. 19 Abbott's N. C. 234; 24 Id. 365.
19. Note on Vested Estates. 18 Abb. N. C. 300.
20. Annual Messages of Gov. Hill, 1890, 1891. Post, p. 20.
21. Revenue Derived from the Tax by Different States. Post, p. 21 (note).

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2. Tax on Successions and Burdens on Land. Peter B. Brodie, London, 1890.
3. A Handbook to the Death Duties. Sydney Buxton, London, 1890.
4. A Treatise on Legacy Duty, etc.; the Law of Domicile. Patrick Lenaghan, London, 1850.
5. Taxes on Successions. Ch. C. Trevor, London, 1881.
6. Epitome of Death Duties. Robt. J. Wallace, London, 1886.
7. Layton, Legacy Duties, etc. (9th Edition). London, 1892.
8. History of Taxation, etc., in England (3 vols.). Dowell.
9. The New Death Duties in England. Earl of Wenchelsea, North American Rev., Jany., 1895, p. 95.
10. Statesman's Year Book, 1893.







# LAW

OF

## COLLATERAL AND DIRECT INHERITANCE, LEGACY, AND SUCCESSION TAXES.

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SECOND EDITION.

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### CHAPTER I.

#### HISTORY OF COLLATERAL AND DIRECT INHERITANCE, LEGACY, AND SUCCESSION TAXES.

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### § 1. Reasons for Such Taxes.

The system or policy of taxing collateral and direct inheritances, legacies, and successions is not of modern origin. Laws relating to these taxes were in force among the Romans, and perhaps even earlier. In modern times such laws will be found in full operation in many European countries. These duties or excises are in force, as a most fruitful source of revenue, among all European states. They exist in Germany, Austria, France, Switzerland and its cantons, Holland, Russia, Italy, Spain, Portugal, Greece, Denmark, and Sweden, and other states. The tax is also imposed in the Australian colonies, and has recently been put into effect in the Canadian provinces. It also exists in Chili and Guatemala. They have existed in England for over a century, with uniform success. Their utility, as a successful means of revenue, has been strongly approved by writers on political economy,<sup>1</sup> and by jurists.<sup>2</sup> In view

<sup>1</sup> Smith, *Wealth Nat.* pp. 683, 684; Mills, *Polit. Econ.* bk. 5, c. 2, § 3.

<sup>2</sup> Mr. Justice Brewer, of the United States supreme court, says of this tax in a letter to the author: "I was not aware until such examination of the extent to which in this country the matter of taxation on successions has advanced. I have often urged that as one of the most just of taxes, and, if it were graduated in proportion to the amount of property passing, I think it would be most beneficial. It

of these facts, it would appear to be somewhat remarkable that this tax was not suggested nor applied in the state of New York, by the legislature, as a method of taxation, until the year 1885, more than 60 years after its successful adoption in Pennsylvania and other states. Since then New York has improved her system; as, by an act passed in 1892,<sup>3</sup> known as the "Transfer Tax Act," she now taxes both lineal and collateral heirs; and the state of Ohio,<sup>4</sup> by acts passed in 1893 and 1894, has adopted similar laws, although that upon direct or lineal heirs has recently been declared unconstitutional.<sup>5</sup> A tax is also imposed upon both direct and lineal heirs in Illinois.<sup>6</sup> Some eminent writers have favored these laws in their utmost severity,<sup>7</sup> because they are said to tend to distribute wealth from the hands of the few to the many, and for the additional reason that they tend to compel individuals to rely more upon their own exertions. This, at least, is the demonstrated economical effect of such laws.<sup>8</sup> As the theories of leading economists have been treated with great consideration by legal writers on general taxation,<sup>9</sup> it would seem that their views are equally entitled to respect upon this subject.

would tend largely to prevent the accumulation of property in a family line, and to work that distribution which is for the interest of all."

"I do not at all criticise the wisdom of the law which imposes a tax upon the succession of collaterals to estates which usually they did not help to earn, and very often do not deserve. On the contrary, I deem the law thoroughly just and wise." Finch, J., in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887.

<sup>3</sup> Chapter 399, Appendix, I. e, and amendments to 1895.

<sup>4</sup> Statutes, Appendix, VI.

<sup>5</sup> Chapter 2, § 18.

<sup>6</sup> See statute, Appendix, X.

<sup>7</sup> But see Cooley, *Tax'n* (2d Ed.) 30.

<sup>8</sup> Mills, *Polit. Econ. supra*.

<sup>9</sup> Cooley, *Tax'n* (2d Ed.) 8-12.

In England, where landed property has always been more or less locked up by a complicated system of tenures and entails, and, under the rule of primogeniture, is confined to the hands of the few, and where personal property is hoarded by the nobility and large corporations, and the general tendency is to centralize wealth, these reasons apply, perhaps, with superadded force. The claim is recently made, however, that the burden of the English system imposed by the succession, legacy, probate, and other duties known generally as "Death Duties" falls most severely upon land.<sup>10</sup>

In this country, however, where land is widely distributed, and unquestionably bears the brunt and burden of taxation (generally to an excessive degree in proportion to what is collected from personal property), the same reasons would seem to fail of application.

Personal property, however, in proportion to its immense value, generally escapes the hands of the collector, and in some localities—especially in large cities—to an alarming extent.<sup>11</sup>

However minute and comprehensive the law applicable to the collection of this tax, a consensus of opinion seems to prevail that the hiding of such property, and the adopting of any dishonorable method to evade the duty, are matters for congratulation on the part of the citizen.

For this reason, in particular, and owing not so much to the faulty condition of the law, a large percentage of personal property annually escapes taxation in the United States; and any system that effectually reaches any portion of this property deserves commendation and study.

A collateral or direct inheritance, legacy, or succession

<sup>10</sup> See an article entitled "The New Death Duties in England," by the Earl of Winchelsea and Nottingham, *North Am. Rev.* Jan., 1895, p. 95.

<sup>11</sup> Ely, *Tax'n*, p. 177.

tax, it seems, presents the most complete system for reaching the class of personal property and privileges which it is framed to embrace, because its collection is aided and facilitated by the requirement of the law that a dead man's property, so to speak, shall somewhere and at some time pass through either a surrogate or probate court, as the case may be, for settlement and distribution.

Here it is generally presented to the public view upon the records; there is not so much opportunity for secrecy; and thus it is brought within easy reach of the taxing state or community.

## § 2. The Tax Defined.

Any exact definition of the collateral inheritance or succession tax must necessarily depend upon the language of the particular statute which may be under consideration. It will be observed, however, that, so far as this country is concerned, there is a general similarity between the different enactments defining the tax and those included within and exempt from the operation of its provisions. From the similarity existing between the Pennsylvania and New York laws, the decisions of the courts of the former state, embracing a period of over 60 years, will be found on this account to be of much importance as precedents upon the many questions that may arise.

The tax may be defined generally to be a burden imposed by government upon all gifts, legacies, inheritances, and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by any deed or instrument made inter vivos, intended to take effect at or after the death of the grantor.

The theory of the promoters of direct inheritance and collateral tax legislation is based both upon logical and legal ground; i. e. that what is generally understood as the

right to take by will or from intestates is, after all, but a mere privilege of the municipal law, to be changed, modified, or repealed in the discretion of the state, and not a natural right,<sup>12</sup> and that it is only just and proper, in consideration of this privilege, that property passing by will to lineals and collaterals, remote relatives, strangers to the blood, and corporations, or, through intestate laws, to collaterals and relatives having for the most part no particular claim whatever upon the decedent, should pay to the state conferring this valuable privilege a fair and reasonable bonus or percentage upon the value of the property thus transmitted and received. Hence these laws have been adjudged by the best authorities to impose, not a mere property tax, as claimed by some, but simply a tax, duty, or excise upon the devolution or succession of property under inheritance and intestate laws. Upon this ground such taxes have uniformly been held to be constitutionally valid, both under the federal and state constitutions;<sup>13</sup> and it has been held that the tax is not like an ordinary tax,—it is

<sup>12</sup> 1 Bl. Comm. bk. 2, pp. 11, 12. See "Forum" for December, 1886; article by Judge Thomas, of Pennsylvania, upon "The Power of the Legislature Over the Subject of Wills," etc.

Prof. R. T. Ely, in "Taxation in American States and Cities" (page 519), gives in full a bill which he approves, and which was presented in the Illinois legislature in 1887, to reform the statutes of descent and wills. Its object is sweeping, being to restrict the amount any person or corporation may take from the same decedent,—wife or husband, not over \$500,000; child, etc., not over \$500,000; remote relatives and others, not over \$100,000.

Such legislation would appear impracticable, or, at least, not consistent with the freedom of American institutions where private rights and property are concerned, though it has been indorsed by Mills (Polit. Econ. bk. 5, c. 9, § 1), who agreed that collateral heirs should be entirely excluded (Id. bk. 2, c. 11, § 3). See, also, an article entitled "Limitations of the Amount One May Take by Descent or by Will," by H. B. Hurd, Esq., 48 Alb. Law J. Sept. 23, 1893, p. 244.

<sup>13</sup> See chapter 2, §§ 8, 25, 27.



not exactly a penalty,—but is more in the nature of an assessment.<sup>14</sup>

It is not a forfeiture, because that presupposes an offense.<sup>15</sup> No matter what it may be called, or upon what interests imposed, no tax can be less burdensome, and interfere less with the productive and industrial agencies of society;<sup>16</sup> and, when the subject is fairly considered, no substantial objection presents itself for not applying the tax rigidly upon all interests, testate and intestate. Possibly, small estates, widows, and purely public and private charitable institutions or almshouses for the gratuitous relief of the poor, sick, and helpless should in all cases be exempt.

### § 3. The Roman Law.

The origin of the collateral inheritance or succession tax is plainly traceable to the Roman civil law. Some writers claim it antedates that law. Gibbon, the historian, says that it was suggested by the Emperor Augustus to the senate, for the support of the Roman army; that it was imposed at the rate of 5 per cent. upon all legacies or inheritances of a certain value; but that it was not exacted from the nearest relatives on the father's side;<sup>17</sup> and that the tax was the most fruitful, as well as the most com-

<sup>14</sup> *Strode v. Com.*, 52 Pa. St. 182.

<sup>15</sup> *Arnaud's Heirs v. His Executor*, 3 La. 337; *Quessart's Heirs v. Canonge*, 3 La. 560; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 462.

<sup>16</sup> *In re McPherson*, 104 N. Y. 316, 10 N. E. 685.

<sup>17</sup> 1 Gibb. Rome, p. 133. Dion Cassius (liber 55) says: "It was imposed upon all successions, etc., except those to the nearest relatives and to the poor." It is also mentioned by Pliny, Panegyricus, c. 37. See 21 Enc. Britt. (8th Am. Ed.; Little, Brown & Co.) "Taxation," p. 65.

prehensive.<sup>18</sup> It was called "*Vicesima hereditatum et legatorum*."

#### § 4. Succession and Legacy Taxes in England.

In England the legacy tax is said to have been first brought to public notice by Adam Smith.<sup>19</sup> There is reasonable ground for claiming, however, that what was substantially an inheritance or succession tax also existed under the feudal system, especially in the exactions which were made by the feudal lords of what are known as reliefs and primer seisins, in which the heir or successor was compelled to pay a certain sum, or perform a certain service, before he could be invested with the estates of his ancestor.<sup>20</sup> While the statutes in this country,<sup>21</sup> as a general rule, cover in one law all property passing to collaterals, etc., by will and by instrument inter vivos, to take effect at or after the death of the grantor, whether of real or personal property, in England legacy and succession taxes are imposed under independent statutes.

Only legacies of personal property were, at first, taxed in that country. Successions to real property, to which the term is more accurately restricted,<sup>22</sup> were not made liable until the year 1853. The English legacy act originated, in 1780, with Lord North, whose attention, it is stated, was drawn to the Roman and Holland systems by Adam Smith's book.<sup>23</sup>

<sup>18</sup> 1 Gibb. Rome, p. 134. See, also, Williams' Case (1827) 3 Bland. 259.

<sup>19</sup> Smith, *Wealth Nat.* pp. 683, 684.

<sup>20</sup> Bl. Comm. (Shars. Ed.) bk. 2, \*66-\*68; Smith, *Wealth Nat.* p. 684; Ely, *Tax'n*, 32.

<sup>21</sup> See Appendix, where 10 of the most important state statutes are given in full.

<sup>22</sup> *Blake v. McCartney*, 4 Cliff. 101, Fed. Cas. No. 1,498.

<sup>23</sup> 3 Dowell, *Hist. Tax'n*, 148. Gibbon's History was published be-

As this act did not apply to devolutions of real property, but was a species of stamp tax upon receipts given for any legacy or share of the personal property of a decedent, and, being easily evaded, it was not a great source of revenue, particularly as where no receipt could be given no tax could be imposed;<sup>24</sup> so that, in 1796, Pitt adopted the Roman system, as modified in Holland, by endeavoring to have all successions taxed. He clearly discerned the effect of such a law upon the revenues of the kingdom, if it could be applied to real estate and kindred property; but the act, as proposed to parliament, seems to have met with opposition, for, as finally passed, it only applied to personal property and shares given under the statute of distributions. By later statute it was extended to *donationes mortis causa*.<sup>25</sup> Finally, in 1853, by the succession duty act,<sup>26</sup> a new law came in force, taxing all successions to real property, chattels real, and a vast variety of personal property and rights not reached by the legacy act. This law owed its existence to the exertions of Gladstone, and to a certain extent displaces the legacy act, though, curiously enough, it has been held that, where the legacy tax may not be imposed, the estate passing may nevertheless be liable to succession duty, and under some circumstances to both.<sup>27</sup>

The act of Victoria is minute in its details, contains elaborate tables for the purpose of establishing the value of

tween 1776 and 1780; Smith's work in 1776; but it is just as likely, as Gibbon held office as secretary under Lord North, that the latter received his ideas from the former.

<sup>24</sup> *Green v. Croft*, 2 H. Bl. 30.

<sup>25</sup> 36 Geo. III. c. 52, § 7; 8 & 9 Vict. c. 76, § 4; 44 Vict. c. 12, § 38.

<sup>26</sup> 16 & 17 Vict. c. 51.

<sup>27</sup> *Attorney General v. Cleave*, 31 Law T. (N. S.) 86; *Attorney General v. Littledale*, L. R. 5 Exch. 275.

annuities and other interests under it and under the legacy act,<sup>28</sup> and seems to tax every conceivable interest accruing either by last will and testament, intestate laws and acts *inter vivos*, and is in some instances both prospective and retroactive.<sup>29</sup> Altogether it presents a most admirable system of taxation.<sup>30</sup>

There would seem to be, as a general rule, no exceptions allowed under this act, even charitable corporations being taxed;<sup>31</sup> but, under the legacy act, legacies to husbands and wives are not taxed. The law was the same under the legacy act of congress. The succession duty act is more comprehensive in these respects than any of the statutes existing in this country, because its effects are sweeping, including not only strangers and collaterals, but, as we have said, lineal heirs in the ascending and descending line.<sup>32</sup> The percentage of the tax is justly graduated from 1 to 10 per cent., which latter sum is assessed upon shares to strangers to the blood and remote relatives.<sup>33</sup>

The succession tax is not imposed upon estates under

<sup>28</sup> 16 & 17 Vict. c. 51, § 31.

<sup>29</sup> Attorney General v. Fitzjohn, 2 Hurl. & N. 465; Wilcox v. Smith, 26 Law J. Ch. 596; Attorney General v. Middleton, 3 Hurl. & N. 125.

<sup>30</sup> The English statutes are collated in Trev. Tax. Suc. (4th Ed., London) p. 299 et seq.

<sup>31</sup> 16 & 17 Vict. c. 51, § 16.

<sup>32</sup> Layton, in speaking of the act, says: "The provisions are of a most comprehensive and searching character, so much so that it is difficult to imagine a transaction or dealing with property, to take effect upon a death after the 19th May, 1853, that will elude its operation, general or special." Leg. & Suc. Dut. (7th Ed.) p. 110.

<sup>33</sup> "The principle of graduation (as it is called),—that is, of levying a larger percentage on a larger sum,—though its application to general taxation would be, in my opinion, objectionable, seems to me both just and expedient as applied to legacy and inheritance duties." Mills, Polit. Econ. bk. 5, c. 11, § 3.

£300,<sup>34</sup> and the legacy duty is not imposed when the personal property is under £100.<sup>35</sup>

That these taxes, when applied under well-drafted laws, may be made wonderfully remunerative to the state, and must lessen the general burden, is easily demonstrated by the fact that the English government now derives an enormous revenue from their enforcement.<sup>36</sup> The law, however, is still said to be open to revision.<sup>37</sup>

The duty has been increased and extended by other statutes.<sup>38</sup>

The act of 1889 fixed an entirely new duty, viz. a fixed 1 per cent. estate duty upon the capital value of estates exceeding £10,000 in value. This act expires June 1, 1896, and is said to be somewhat experimental; and by the "finance act," passed in 1894, a further tax has been imposed of 1 per cent. upon real estate and personal property of the value of £10,000 and upward.<sup>39</sup> This is a substitute for the estate duty.

<sup>34</sup> 44 Vict. c. 12, § 36; 16 & 17 Vict. c. 51, § 18.

<sup>35</sup> 43 Vict. c. 14, § 13.

<sup>36</sup> In 1881 it amounted to £3,592,777; in 1882, £3,540,585; and in 1883, £3,536,238, or nearly \$18,000,000.

<sup>37</sup> 3 Dowell, *Hist. Tax'n*, p. 155.

<sup>38</sup> See Act 1888, 51 Vict. c. 8; Act 1889, 52 Vict. c. 7, "Estate Duty"; 57 & 58 Vict. (1894) c. 30, "The Finance Act."

<sup>39</sup> See these acts discussed, in a brochure, entitled "Estate Duty and Successive Duty," by J. E. C. Munro, Esq., London, 1894. The interested reader may also consult the following authors upon the English acts:

(1) Brodie, Peter B. *Tax on Successions and Burdens on Land*. London. 1890.

(2) Buxton, Sydney. *A Handbook to the Death Duties*. London. 1890.

(3) Lenaghan, Patrick. *A Treatise on Legacy Duty, etc.; the Law of Domicile*. London. 1850.

(4) Trevor, Ch. C. London. 1881.

(5) Wallace, Robt. J. *Epitome of Death Duties*. London. 1886.

(6) Layton. *Legacy, etc.; Duties*. 9th Ed. London. 1892. (This

The tax is said to bear heavily and severely upon land, and it has been criticised upon this ground.<sup>40</sup>

The revenue derived from the probate, legacy, and succession and estate duties, in England, is enormous, amounting to over £11,000,000 annually.<sup>41</sup> Payment of the tax is secured by provisions which not only make the duty a first charge or lien on the property, as well as a debt to the crown from the successor, but also make all persons accountable to the crown for the duty,—such as trustees and executors. We have given a few excerpts from these acts in the notes.<sup>42</sup>

is an excellent work. It contains a full account of all death duties exacted under the English law.)

(7) Dowell. *History of Taxation and Taxes in England*.

<sup>40</sup> See article "The New Death Duties in England," by the Earl of Winchelsea and Nottingham, *North Am. Rev.* Jan., 1895, p. 95.

<sup>41</sup> See *Finance Accounts* 1889-90, p. 17; *Id.* 1890-91, p. 19; *Report Com'rs Int. Rev.* 1891, p. 19; *Statesman's Year Book* 1893, p. 43; "The Inheritance Tax," by Max West, *N. Y.*, 1893, p. 41.

<sup>42</sup> 3 Dowell, *Hist.* p. 152; 16 & 17 Vict. c. 51, §§ 42, 44. For the English statutes and decisions thereon, also consult 3 *Fish. Har. Dig.* 5416-5430; 4 *Fish. Har. Dig.* 7480; 6 *Fish. Com. Law Dig.* 631. The "Legacy Act" (55 Geo. III. c. 184) makes the following rates payable on legacies and the residue of personal estate and real estate directed to be sold, whether the title to such residue accrues by virtue of any testamentary dispositions or upon a partial or total intestacy, whether the amount is £20 or upward:

(1) Children of their descendants, or parents, or other lineal ancestors, £1 per cent.

(2) Brothers or sisters, or their descendants, £3 per cent.

(3) Brothers or sisters of fathers and mothers, or their descendants, £5 per cent.

(4) Brothers or sisters of grandmothers, etc., £6 per cent.

(5) Persons of any degree of collateral consanguinity, or strangers to the blood, £10 per cent.

See 36 Geo. III. c. 52; 45 Geo. III. c. 28.

The "Succession Duty Act" of 1853 (16 & 17 Vict. c. 51. See, also, 51 Vict. c. 8; 52 Vict. c. 7) provides as follows: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon

### § 5. The American Statutes.

As has been said, collateral inheritance, succession, and lineal tax laws now exist in the states of Pennsylvania, Maryland, Illinois, Virginia, West Virginia, New York (di-

the death of any person dying after the time appointed for the commencement of this act, either immediately or after interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, to any person in possession or expectancy, shall be deemed to have conferred or to confer, on the person entitled by reason of any such disposition or devolution, a 'succession,' and the term 'successor' shall denote the person entitled, and the term 'predecessor' shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Joint tenants taking by survivorship are deemed successors, and successions are conferred by general powers of appointment. Persons entitled to real estate, subject to life leases, are not liable; and dispositions with a reservation of benefit to the grantor, etc., or to take effect at periods depending on death, or made to evade the duty, are liable.

The following are the rates of duty:

(1) Where "successor" is the lineal issue or lineal ancestor of predecessor, £1 per cent.

(2) Where he is brother, sister, or descendant of brother or sister of predecessor, £3 per cent.

(3) Where he is brother or sister of father or mother, or descendant of brother or sister of father or mother, etc., £5 per cent.

(4) Where he is brother or sister, or grandmother or grandfather, or descendant of brother or sister of grandfather or grandmother of predecessor, £6 per cent.

(5) Where he stands in any other degree of collateral consanguinity to the predecessor, or is a stranger in blood to him, £10 per cent.

(6) Succession subject to trusts for charitable or public purposes are liable to £10 per cent.

For tables calculating legacy and succession duties under above acts, see, also, Theob. Wills (3d Ed.) 614.

rect and collateral), Connecticut, Delaware, and Ohio (direct and collateral), and were for a time in force in North Carolina and Louisiana.<sup>43</sup> The collateral inheritance tax laws have also been put in force in Maine, Massachusetts, California, Ohio, Illinois, New Jersey, Tennessee, and by constitutional provision in Minnesota, and it will not be long before they are enacted in every state of the Union.

Legacy and succession taxes were likewise imposed upon real and personal property under several different acts by congress during the War of the Rebellion, and they were a prolific source both of revenue and litigation to the federal government. They imposed a tax of 1 to 5 per cent. upon both lineal and collateral heirs, exempting only husband or wife of decedent under the legacy act, and in this respect, as well as in the terms used, were much like the English acts from which they were evidently taken.<sup>44</sup> These laws, however, with their numerous amendments, were all swept away by the repealing act of 1870, and it has not been thought important to present them in the Appendix.<sup>45</sup>

Under the income tax act passed in 1894, a tax of 2 per cent. was imposed by congress upon money, and the value of all personal property acquired by gift or inheritance, but

<sup>43</sup> See statutes of New York, New Jersey, Pennsylvania, Massachusetts, Maine, Connecticut, Illinois, California, Ohio, and Maryland, Appendix I.-X.; In re McPherson, *supra*; Ely, *Tax'n* (1888) p. 313; Davies' *System of Taxation* mentions Missouri, but I have been unable to find any such law in that state. See, also, "The Inheritance Tax," by Max West, N. Y., 1893.

<sup>44</sup> *Scholey v. Rew*, 23 Wall. 349.

<sup>45</sup> Act June 30, 1864, c. 173, § 173; 13 Stat. 223-285; *Id.* p. 287, §§ 124, 127, 128; 14 Stat. 98-100; repealed by Act July 14, 1870, c. 255 (16 Stat. 256-261) § 17 (Rev. St. U. S. [2d Ed., 1878] p. 679),—the repealing clause of which act, however, provided: "All provisions of said act shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed or accruing under the provisions of former acts or drawbacks," etc.



under the recent decision of the supreme court this act having been declared unconstitutional this portion of the act falls.<sup>46</sup>

In this country, differing from the English method, except under the acts of congress above referred to, these taxes have, as a rule, been imposed only upon certain collateral relatives, strangers to the blood, and corporations that are not specially exempted by law from taxation. In including both real and personal property within the purview of the law, the earliest of American statutes made a vast improvement upon the English system as embraced in the legacy act, but, unlike the English laws or the succession and legacy laws of congress, too many exemptions and exceptions seem to have been made in the state statutes, and thus a vast amount of property devolving upon collaterals and so-called charitable institutions annually escapes taxation here which is there made to pay duty. In these respects the American system is insuperably inferior to that of England.

(a) *Pennsylvania.*

The English law evidently soon attracted attention in this state, for the first collateral inheritance act was passed in Pennsylvania in 1826. This act is, perhaps, still in force under the rulings of the Pennsylvania courts, but it has been considerably modified by various amendments, added from time to time, and recently, by the law of 1887, the whole subject has been codified. It is said that the provisions of the new act are scarcely more than a re-enactment and consolidation of the prior laws.<sup>47</sup>

<sup>46</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673.

<sup>47</sup> *Laws Pa.* 1887, p. 79. See Appendix, III.; *Commonwealth's Appeal*, 128 Pa. St. 603, 18 Atl. 386; *Id.* (Pa. Sup.) 17 Atl. 1096; *Id.*, 5 Pa. Co. Ct. R. 271, affirmed 127 Pa. St. 435, 17 Atl. 1094; *Bittinger's Estate* (1889) 129 Pa. St. 338, 18 Atl. 132. See *In re Del Busto's Estate*

{ “The tax has contributed so essentially to the firm establishment of the credit of Pennsylvania,” says an eminent judge, “and has been so long approved by the people of the state, that it is not likely ever to be given up,”<sup>48</sup> an assertion the truth of which is fully confirmed by the large revenue derived from this tax in 1889, and since.<sup>49</sup> Efforts have been recently made in this state to put in force a tax on property passing to direct or lineal heirs, but it failed of success.

(b) *Louisiana.*

In Louisiana, by law of 1828,<sup>50</sup> a legacy tax was imposed of 10 per cent. upon legacies to foreign heirs and citizens residing abroad. This law, as modified, was finally repealed in 1877, for what reason does not appear.<sup>51</sup>

(c) *Maryland.*

The Maryland law was passed in 1864, and is now contained in the Code of that state.<sup>52</sup>

(1888) 45 Leg. Int. 474, 23 Wkly. Notes Cas. 111, where Penrose, J., has collated and explained all the laws of Pennsylvania on the subject. The act of 1887 is simply a digest or compilation of all prior acts on the subject, and declaratory of the law as theretofore construed. Small's Estate, 151 Pa. St. 1, 25 Atl. 23; Weaver's Estate (1895) 12 Lanc. Law Rev. 57. The law from 1826 to 1855 will be found in 1 Brightly's Purd. Dig. 214. The subject is also treated to a limited extent in Scott, Intest. Laws Pa. 1871, p. 535 et seq., and briefly considered by Hil. Tax'n, p. 195.

<sup>48</sup> Com. v. Coleman, 52 Pa. St. 473.

<sup>49</sup> See note, p. 21.

<sup>50</sup> Acts March 25, 1828, Act No. 95.

<sup>51</sup> Act 1877, p. 125, repealing articles 1221-1223, Rev. Civ. Code, and sections 3683, 3684, Rev. St. 1870. See, also, Act March 15, 1830, § 1; Act March 16, 1842, § 4.

<sup>52</sup> See Appendix, VIII.; Pub. Gen. Laws Md. 1888, p. 1242, art. 81; Rev. Code 1878, p. 117. See, also, Laws 1844-45, c. 237; Laws 1845-46, c. 202; Laws 1874, c. 483, §§ 113, 115; Laws 1880, c. 444;

(d) *Virginia*.

In Virginia the law has, from time to time, existed since 1844. It imposed a tax of 5 per cent.<sup>53</sup>

(e) *North Carolina*.

The statute of North Carolina upon this subject was passed in 1846,<sup>54</sup> but it seems to have suffered repeal in 1883.<sup>55</sup>

(f) *Delaware*.

The statute passed in Delaware in 1869, has since been embodied in the Revised Code of that state. The act is based upon the English statutes, the tax being graduated from 1 to 5 per cent.<sup>56</sup>

(g) *Connecticut*.

The statute of Connecticut, passed in 1889, imposes a tax of 5 per cent. upon all sums over \$1,000.<sup>57</sup>

(h) *West Virginia*.

In this state a law has existed since 1887, by which a tax of 2½ per cent. is imposed upon collateral inheritances, and where the amount of the estate is less than \$1,000 it is exempt.<sup>58</sup>

Id. c. 455. In this state the gift of freedom to a slave was taxed. *State v. Dorsey* (1848) 6 Gill, 388.

<sup>53</sup> See *Eyre v. Jacob*, 14 Grat. 422; Laws Feb. 6, 1844; Code 1849, c. 36 et seq.; Act March 28, 1863, § 15; Act 1866-67, p. 861, c. 64, § 3. The act of 1854 was repealed by the act of 1856. *Fox v. Com.*, 16 Grat. 1. For a history of these laws, see *Miller v. Com.* (1876) 27 Grat. 112.

<sup>54</sup> Laws 1846, c. 72, §§ 1, 2; Laws 1848-49, c. 81; *Battle's Revision* 1873, p. 775, § 59.

<sup>55</sup> Code N. C. 1883, § 3867.

<sup>56</sup> See Rev. Code Del. 1874, p. 38; 13 Laws Del. 1869, c. 390.

<sup>57</sup> See Appendix, VII., Pub. Laws Conn. 1889, p. 106, c. 180, as amended by Laws 1893, c. 257, p. 406.

<sup>58</sup> Warth's Code (2d Ed.) 1887, c. 32, § 51a; Laws 1887, c. 31. See, also, Laws 1891, c. 116.

(i) *New York.*

The law in this state was originally enacted in 1885.<sup>59</sup> It was at first purely a tax upon collateral inheritances. The statute was amended in 1887, 1889, 1890, and 1891.<sup>60</sup> The original acts of 1885 and 1887 were based upon the statutes of Pennsylvania existing prior to 1855, and with few exceptions they differed little in substance from these laws. They were, however, drafted carelessly, and were indefinite regarding the taxation of contingent interests, remainders, and future estates, and were, for that reason, the cause of considerable judicial criticism, and of conflicting opinions in the lower courts. It has been well said that these statutes represented the crude and severe system as it existed under the Pennsylvania act of 1826, without embodying the various amendments subsequently added thereto.<sup>61</sup> But in 1891, owing to the exertions of the then governor (Hon. David B. Hill), the system was extended so as to include also a tax of 1 per cent. upon lineal heirs where the estate was personalty of \$10,000 or over, real estate being exempt.<sup>62</sup> The system was further improved in 1892 by the enactment of an entirely new law, containing many important provisions, especially those in relation to the taxation of contingent and future estates.<sup>63</sup> Its provisions have largely been made definite by judicial determination. This act with further amendments to 1895 is still in force. The act is entitled "An act in relation to taxable transfers of property." It imposes—First, a tax upon personalty devised to or inherited by lineal heirs and others of 1 per cent. where the estate

<sup>59</sup> Chapter 483 took effect June 30, 1885; *In re Howe*, 112 N. Y. 100, 19 N. E. 513, affirming 48 Hun, 235.

<sup>60</sup> See Appendix, I., Laws 1887, c. 713; Laws 1889, cc. 307, 479; Laws 1890, c. 553; Laws 1891, c. 215.

<sup>61</sup> For notes on Collateral Inheritance Tax, see 19 Abb. N. C. 234; *In re Wolfe*, 29 Abb. N. C. 358, 456, 21 N. Y. Supp. 515, 522.

<sup>62</sup> Laws 1891, c. 215.

<sup>63</sup> See Appendix, I. e, Laws 1892, c. 309.

if of the value of \$10,000 or more; and, secondly, a tax upon both real and personal property, devised to, or inherited by, collateral heirs, corporations, and strangers to the blood, the tax being at the rate of 5 per cent. where the estate is of the value of \$500 or over.<sup>64</sup>

A number of amendments were made to the act of 1892 by the legislature between that time and the year 1895, and these will also be found in their proper places in the Appendix.<sup>65</sup>

The revenues derived by the state under these important laws, as will be seen by the statistical table below, have increased almost uniformly each year, and it will, if properly managed, be, in the course of a few years, one of the most remunerative taxes imposed. The expense of collection is not large, as, instance the year 1892, it was only \$84,819. The revenue under the acts would be much larger were there not so many exemptions allowed to charitable, religious, and other miscellaneous corporations and institutions, and by judicial exemptions of the personalty of nonresidents, as decided in *Re James*.<sup>66</sup> At least 13 different institutions of religious and charitable character are exempted under the act of 1890,<sup>67</sup> and others under the act of 1892.<sup>68</sup>

<sup>64</sup> Act 1892, c. 399, § 26, and Laws 1893, p. 355, c. 199, § 2, repeal the following laws previously existing: Laws 1885, c. 483; Laws 1887, c. 713; Laws 1889, cc. 307, 479; Laws 1891, c. 215; Laws 1892, c. 443.

The following statutes remain unrepealed, and with the act of 1892 are contained in the Appendix: Laws 1890, c. 553; Laws 1892, c. 168; Laws 1893, c. 704; *Id.* p. 1725, c. 692, § 48c; *Id.* p. 355, c. 199; Laws 1894, p. 1929, c. 767.

<sup>65</sup> They are Laws 1895, c. 556, amending section 13, c. 399, Laws 1892, and chapter 191, amending section 14; chapter 378, amending section 15.

<sup>66</sup> 144 N. Y. 6, 38 N. E. 961.

<sup>67</sup> Chapter 553.

<sup>68</sup> Chapter 399.

Exemptions so sweeping impair the stability of any law, and they should be either wholly repealed or restricted to institutions that do public charity.<sup>69</sup>

<sup>69</sup> On January 7, 1890, Governor Hill, of New York, who has been a strong exponent of these laws, said in his message to the legislature: "But it is respectfully suggested as worthy of the consideration of the legislature whether a satisfactory solution of the problem of taxing personal property may not be found in a graduated probate and succession tax upon the personal property of decedents, developing into a complete system the theory of the collateral inheritance tax. Already most estates of decedents are carefully appraised by disinterested parties through the machinery of our surrogates' courts. Without going into details, it seems possible to devise a system requiring all estates of decedents over a certain valuation to be administered in a surrogate's court, at least so far as to obtain an appraisal of the personal property thereof; and, after allowing reasonable exemptions to the immediate next of kin, a percentage tax may be imposed upon the remainder, reasonably graduated by an increasing percentage as the relationship of those who are to receive is more remote, and as the valuation of the estate is greater. The theory of such a graduated percentage tax is not harsh or inequitable. Such a system has, I am advised, existed for a long time in England, and has worked well, and the propriety of its adoption here is suggested for your consideration." In his annual message to the legislature (January 6, 1891), Governor Hill again touched upon this subject, recommending a probate and succession tax. He said: "If, however, the legislature in its wisdom shall hesitate to adopt the radical changes here outlined, another method of reaching personal property for the purpose of taxation may be found in the plan of a graduated probate and succession tax upon the personal property of decedents. Nearly all such estates are carefully appraised by impartial officials selected by our surrogates' courts, and upon such appraisal the personal estate can at least be subjected to one tax, although it may never have been able to be reached during the life of the decedent. A system can easily be devised absolutely requiring all estates of decedents over a certain valuation to be administered in a surrogate's court, to the extent of obtaining an appraisal of the personal property thereof; and, after allowing reasonable exemptions to the immediate next of kin, a fair percentage tax may be imposed upon the remainder, collectible in the surrogate's court, and reasonably graduated ac-

(j) *Maine.*

A collateral inheritance tax of  $2\frac{1}{2}$  per cent., where the property passing is above the sum of \$500, is imposed by a

according to the value of the estate. The theory of such a graduated percentage tax seems fair and just, especially in view of the fact that personal property, under existing methods, nearly entirely escapes taxation during the life of its owner. A similar system is in operation in England, and I am advised that it works satisfactorily, and the propriety of its adoption here is suggested for your consideration."

Table showing the revenue derived from collateral taxes by the following states:

	1886.	1887.	1888.	1889.	1890.
New York.....	\$ 84,128	\$561,716	\$736 062	\$1,075 692	\$ 1,117,677 00
Pennsylvania.....	662,976	763,871	713,434	1,378,458	670,371 00
Maryland.....		45,597	57,767	56,893	83,656 00
Delaware.....		913			
Connecticut.....					14,600 42

	1891.	1892.	1893.	1894.	1895 to Aug. 8.
New York.....	\$ 8 0.267 00	\$1,786,218 00	\$3 071,687 09	\$1,688,954 20	\$1,908,122
Pennsylvania.....	1,232,766 00	1,111,120 00			
Maryland.....	67,738 01	114,069 00			
Delaware.....					
Connecticut.....	74,758 93	177,662 97			

Massachusetts received in 1892 about \$12,000 from this tax; in 1893, about \$59,000; and in 1894 over \$127,000. It is proposed to tax direct heirs in this state.

The present comptroller of the state of New York, and his deputy, Hon. W. J. Morgan, have taken a very active interest in the enforcement of these laws. In the report of the comptroller for 1895 he says: "During the fiscal year ending September 30, 1894, there was collected under the transfer or succession tax laws the sum of \$1,688,954.20. The average for the eight prior years during which the law has been in operation has been \$1,165,426.31. There was therefore collected \$523,527.89 in excess of the average annual amount. The fiscal year ending September 30, 1893, was notable in the number of large estates settled, four estates alone paying the unusual tax of \$1,096,036.97. The largest sum received during the last fiscal year from any estate was \$70,000. Some decrease in the receipts of this bureau during the past year has undoubtedly been due to the

statute passed in this state in 1893.<sup>70</sup> By recent decision of the supreme court this statute has been declared constitutional.<sup>71</sup>

(k) *Massachusetts.*

In this state a collateral inheritance tax of 5 per cent. is imposed by an act passed in 1891.<sup>72</sup> It is imposed upon all estates exceeding the value of \$10,000, after the payment of all debts. This act has been declared constitutional by the supreme court of the state.<sup>73</sup>

(l) *New Jersey.*

In this state, by a statute passed in 1892, a collateral inheritance tax of 5 per cent. is imposed upon all estates passing to collaterals where the value exceeds \$500. This act was amended in 1893 and 1894, and all prior laws repealed.<sup>74</sup> The act has been declared unconstitutional so far as it attempts to tax real estate. In other respects it is a valid legislative act.<sup>75</sup> Real estate is now liable under the act of 1894.\*

(m) *Ohio.*

In this state there are two statutes: A collateral inheritance tax imposed under an act passed in 1893 and amended April 20, 1894.<sup>76</sup> This act imposes a tax of 5 per cent. upon

shrinkage in property values." Report of Hon. James A. Roberts, State Comptroller, N. Y., 1895, p. 17.

<sup>70</sup> See Appendix, V., Laws 1893, c. 146; Laws 1895, cc. 96, 124.

<sup>71</sup> State v. Hamlin (1894) 86 Me. 507, 30 Atl. 76.

<sup>72</sup> Appendix, IV. a, Laws 1891, c. 425.

<sup>73</sup> Minot v. Winthrop (1894) 162 Mass. 116, 38 N. E. 512.

<sup>74</sup> Appendix, II., Laws 1894, c. 210, repealing Laws 1892, c. 122; Laws 1893, c. 210.

<sup>75</sup> Van Riper v. Happenheimer (Feb., 1894) 17 N. J. Law J. 49; In re Dobermuller, Id. 373.

\* Appendix, II.; State v. Hancock (1895; N. J.) 32 Atl. 689.

<sup>76</sup> See Appendix, VI. a, Laws 1893, p. 14, as amended by Laws 1894, p. 169.



all property exceeding the value of \$200. By a further act, passed in 1894, entitled "An act to impose a direct inheritance tax," <sup>77</sup> a graduated tax is imposed upon property passing to lineal heirs. But this act has been recently declared unconstitutional, as violating provisions of the state and federal constitutions. On appeal to the supreme court of Ohio the decision of the lower court was affirmed.<sup>78</sup>

(n) *California.*

A law taxing collateral inheritances, bequests, and devises was passed by the legislature of this state and approved March 23, 1893.<sup>79</sup> It is evidently modeled upon the New York statute of 1887. It imposes a tax of 5 per cent. upon all estates passing to collateral heirs and strangers, providing that an estate which may be valued at a less sum than \$500 shall not be subject to the tax or duty.

(o) *Tennessee.*

By a statute passed in this state in 1891,<sup>80</sup> and continued by a law passed in 1893,<sup>81</sup> a 5 per cent. collateral inheritance tax is now imposed.

(p) *Illinois.*

Under a recent statute passed in June, 1895,<sup>82</sup> entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same," a tax

<sup>77</sup> See Appendix, VI. b, Laws 1894, p. 166.

<sup>78</sup> The decision in the lower court is in *State v. Ferris* (April, 1895) 9 Ohio Cir. Ct. R. 299, affirmed, as *State of Ohio ex rel. Prosecuting Attorney v. Ferris*, Probate Judge, 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352. The opinion will be published in the N. E. Rep. as soon as handed down.

<sup>79</sup> See Appendix, IX., Laws 1893, c. 168.

<sup>80</sup> Laws 1891, Extraord. Sess. c. 25, § 6.

<sup>81</sup> Laws 1893, c. 174, p. 347.

<sup>82</sup> See statute, Appendix, X., taken from Bradwell's Edition of Illinois Statutes for 1895 (page 213), approved June 15, 1895, in force July 1, 1895 (Laws 1895, Reg. & Ex. Sess. p. 301).

is now imposed<sup>83</sup> upon certain lineal and collateral heirs of 1 per cent., providing that any estate which may be valued at a less sum than \$20,000, shall not be subject to any such duty or taxes; and the tax is to be levied in this case only upon the excess of \$20,000 received by each person. The tax on certain collateral heirs, such as uncle, aunt, niece, nephew, or any lineal descendant of the same, is imposed at the rate of \$2 on the clear market value of such property received by each person on the excess of \$2,000 so received by each person. The statute provides that in all other cases the rate shall be as follows: On each and every \$100 of the clear market value of all property, and at the same rate for any less amount; on all estates of \$10,000 and less, 3 per cent.; on all estates of over \$10,000 and not exceeding \$20,000, 4 per cent.; on all estates over \$20,000 and not exceeding \$50,000, 5 per cent.; and on all estates over \$50,000, 6 per cent.; exempting an estate which may be valued at a less sum than \$500. This statute is evidently modeled after the New York statutes in many respects, but it does not seem to have been carefully drafted with regard to legal phraseology, and for this and other reasons may unfortunately be the source of much litigation.

(q) *Minnesota.*

Under the constitution of this state, by recent amendment,<sup>84</sup> it is provided that there may be, by law, levied and collected a tax upon all inheritances, devises, bequests, legacies, and gifts of every kind and description above a fixed and specified sum, of any all natural persons and corporations. Such a tax, above such exempted sum, may be uni-

<sup>83</sup> Id. § 1; St. (Bradwell's Ed.) p. 213, § 307.

<sup>84</sup> Adopted November 6, 1894. See note on proposed tax, 2 Minn. Law J. May, 1894, p. 123. This provision was evidently inserted to meet the ruling in *State v. Gorman*, 40 Minn. 232, 41 N. W. 948.

form, or it may be graded or progressive, but shall not exceed a maximum tax of 5 per cent.

(r) *Proposed Legislation in other States.*

The times seem to be propitious for this system of taxation. It is being agitated successfully everywhere, and has few opponents, and it will not be long before it will be adopted by all the American states. Legislation looking to its adoption in other states where these laws are desired has been very active during the past four years, and the system has been undergoing improvement in the states where the laws already exist.

In Illinois, as we have already noticed, a law has been recently passed taxing property passing to collateral and lineal heirs in certain cases, including both the estates of resident and nonresident decedents. In Minnesota and Wisconsin bills were before the legislatures of 1893 and 1895, proposing inheritance taxes, but failed to pass. In Minnesota, however, as we have seen, a constitutional amendment has been made allowing the legislature to impose a graded tax.<sup>86</sup>

An amendment to the Pennsylvania statute of 1887 was proposed in the legislature of 1894 and 1895, imposing a tax upon lineal heirs, but the bill was defeated in the senate. Similar bills were proposed in Connecticut and Massachusetts. Bills have also been pending, but did not succeed, during the present year, before the legislatures of Michigan, Minnesota, and Nebraska, and other states. The federal inheritance or succession tax of 2 per cent. contained in the income tax act of 1894 is inoperative, the whole act having been declared unconstitutional.<sup>87</sup>

<sup>86</sup> See *State v. Mann*, 76 Wis. 469, 45 N. W. 526, and 46 N. W. 51; *State v. Gorman*, 40 Minn. 232, 41 N. W. 948.

<sup>87</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673.

### § 6. Canadian Statutes.

In recent years this system of taxation has also been introduced in the Canadian or British provinces, in the form of succession and legacy duties. A short reference to some of these statutes may be instructive.

#### (1) *Quebec*.<sup>88</sup>

By a statute in force in this province, passed in 1892, amended in 1894, duties are imposed on successions to and transfers of real estate and movable property at the rate of from 1 to 10 per cent.

Estates that do not exceed \$3,000 are exempted.

The tax is graded as follows:

Relating to property passing to those standing in a direct line, a duty of  $\frac{1}{2}$  per cent. on any sum between \$3,000 and \$5,000 to 3 per cent. on sums over \$200,000.

In the collateral line the duty is from 3 per cent. to 8 per cent., according to degree of relationship.

To strangers to the blood a duty of 10 per cent. is imposed.

#### (2) *Ontario*.

Succession duties are imposed under a statute passed in 1892.<sup>89</sup> Estates not exceeding \$10,000 and legacies not exceeding \$200 are exempt, and direct heirs are taxable only when the whole estate exceeds \$100,000. The rate is  $2\frac{1}{2}$  per cent. where the property passing is between \$100,000 and \$200,000, and passes to decedent's father, mother, husband, wife, children, grandchildren, daughters-in-law, and sons-in-law, and 5 per cent. where the property exceeds \$200,000. Remote relatives pay 5 per cent. and strangers to the blood

<sup>88</sup> Statute of Quebec, 55 & 56 Vict. 1892, p. 46, c. 17, amended by 57 Vict. (1894) p. 84.

<sup>89</sup> 55 Vict. p. 9, c. 6.

10 per cent. Religious, charitable, and educational bequests are exempt.

(3) *Nova Scotia.*

A duty is assessed on all property, real or personal, capable of being devised or bequeathed, or passing by descent or inheritance.<sup>90</sup> The act does not apply to property under \$5,000, or to property given to religious or charitable purposes, or to a father, mother, husband, wife, child, brother, sister, daughter-in-law, or son-in-law, where the property so passing does not exceed \$25,000. Where the value is in excess of such figures a tax at 2½ per cent. is imposed, and when it exceeds \$100,000 5 per cent.

Where property passes to other lineal relatives than those named, and exceeds \$5,000, the excess is taxed at 5 per cent.

To collateral relatives or strangers to the blood the duty is 10 per cent.

Legacies that do not exceed \$200 are exempted.

(4) *Manitoba.*

Duty is assessed on all property, real or personal, capable of being devised or bequeathed, or passing by inheritance or descent.<sup>91</sup>

Estates not exceeding \$4,000 are exempted to the same lineal relatives as those under the Nova Scotia statute.

On all others there is a graded duty of from 1 per cent. up to \$25,000 to 10 per cent. on one million or more.

(5) *British Columbia.*<sup>92</sup>

Here the act does not apply to estates of less than \$5,000, nor to property passing to or for use of father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law of deceased, where the property so passing does not ex-

<sup>90</sup> Laws 1892, p. 97, c. 6, as amended Laws 1894, p. 59, c. 29.

<sup>91</sup> 56 Vict. pp. 88-93, c. 31.

<sup>92</sup> Laws 1894, p. 249, c. 47.

ceed \$25,000. If it exceeds \$25,000, the first \$5,000 is exempted, and the rest taxed at one-half of the rates hereinafter named.

With these exceptions all other property is taxed as follows: Up to \$100,000, 1 per cent.; between \$100,000 and \$1,000,000, from 2 to 4 per cent.; over \$1,000,000, it is 5 per cent.

## CHAPTER II.

## NATURE OF TAX AND ITS CONSTITUTIONALITY.

- § 7. General Power of State over Taxation.
8. Collateral, Direct, or Inheritance Tax is upon the Privilege of Succession to Property.
  9. Nature of Tax in New York, under Act of 1892.
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  13. Not a Property Tax.
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  27. Government Bonds and State Securities.
  28. United States and Municipalities—Legacies to—Taxable.
  29. Legatee's or Owner's Domicile as to Personal Property and its Situs.
  30. Exemptions—When Constitutional.
  31. General Questions as to Jurisdiction.

## § 7. General Power of State over Taxation.

In all matters appertaining to the domain of taxation, as to the subject-matter of the tax, persons, method of valuation, and the like, there can be no doubt that, as a general rule, the power of the several states is practically un-

limited within their several jurisdictions, except where restricted or controlled by their constitutions, or by the constitution and laws of the United States; and it is said that in the exercise of this function the legislature possesses full, absolute, and sovereign power. Where the power of the state has not been thus interdicted, controlled, or surrendered to the general government, its exercise rests in the sound discretion of the lawmaking body.<sup>1</sup>

No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state.<sup>2</sup>

### § 8. Collateral, Direct, or Inheritance Tax is upon the Privilege of Succession to Property.<sup>3</sup>

With these well-settled principles in view, we will now consider briefly the various constitutional objections that have been frequently urged in the state and federal courts against statutes imposing legacy, inheritance, and succession taxes, and it may be asserted that these objections have all finally tended to settle—First, the precise nature of the tax, as imposed by such laws; secondly, the power of the

<sup>1</sup> Cooley, Tax'n (2d Ed.) 5-7; McCulloch v. Maryland, 4 Wheat. 316; Kirkland v. Hotchkiss, 100 U. S. 491; Eyre v. Jacob (1858) 14 Grat. 426; In re McPherson (1887) 104 N. Y. 316, 10 N. E. 685; Railroad Co. v. Pennsylvania (1872) 15 Wall. 300, 319; Appeal of Commonwealth (Bittinger's Estate) 129 Pa. St. 338, 18 Atl. 132; In re Sherwell's Estate (1891) 125 N. Y. 379, 26 N. E. 464; Id., 58 Hun, 608, 12 N. Y. Supp. 200; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, affirming 107 Pa. St. 156. See an article entitled "The Taxing Power, Its Constitutional Limitations, Restraints, and Requirements," 42 Alb. Law J. (July 2, 1890) 64.

<sup>2</sup> Pullman's Palace Car Co. v. Pennsylvania, *supra*.

<sup>3</sup> See, also, *post*, § 21.



several states and of the general government, within the well-known restrictions above named, to enact laws imposing the same.

It is now an established doctrine that, so far as the nature of the tax is concerned, such taxes are nothing more than a burden, bonus, excise, or assessment, as they have been variously defined, imposed by government upon the passing, devolution, transmission, or privilege of taking or receiving property under wills and intestate laws, whether such property passes to collateral or lineal heirs; and, to prevent a fraudulent or intentional evasion of the tax, provisions have, in nearly all the statutes, also been inserted, making the tax applicable to all transfers made *inter vivos* or *causa mortis* intended to take effect at, upon, or after the death of the transferer. The right to impose these taxes is based upon the broad, constitutional power of the state, as a sovereign, to modify, amend, extend, or wholly to repeal the laws governing the transmission of property by will and intestate laws. Such laws confer, at the utmost, a mere privilege upon the heirs or other representatives of the decedent of succeeding to the estate, and the legislature has the constitutional power to tax the privilege conferred, as it has the right to tax any other privileges within its jurisdiction.<sup>4</sup>

These principles will be found to be fully substantiated in the cases referred to in the notes.<sup>5</sup>

<sup>4</sup> See chapter 1, § 2.

<sup>5</sup> *Eyre v. Jacob* (1858) 14 Grat. 427; *Miller v. Com.* (1876) 27 Grat. 110; *Tyson v. State* (1868) 28 Md. 577; *State v. Dalrymple* (1889) 70 Md. 294, 17 Atl. 82; *In re McPherson* (1887) 104 N. Y. 306, 10 N. E. 685; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *In re Cullum's Estate*, 5 Misc. Rep. 173, 25 N. Y. Supp. 700, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163; *In re Merriam's Estate*, 141 N. Y. 484, 36 N. E. 505; *Mager v. Grima* (1849) 8 How. (U. S.) 490; *Scholey v. Rew* (1874) 23 Wall. 331; *Strode v. Com.* (1866) 52 Pa. St. 181; *Clymer v. Com.*, Id. 189; *Com. v. Herman* (1885) 16

It will also be observed that the various statutory provisions define the tax in substantially the same manner as that given above.<sup>6</sup>

In one of the earliest cases decided in Virginia<sup>7</sup> the rule above stated was announced, and has ever since been followed. Judge Lee, in an admirable opinion,<sup>8</sup> said: "The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted. \* \* \* The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a de-

Wkly. Notes Cas. 495; *Wallace v. Myers* (1889) 38 Fed. 184; *Pullen v. Commissioners* (1872) 66 N. C. 361. See, also, *In re Howard* (1887) 5 Dem. Sur. 483; *Williams' Case* (1827) 3 Bland, 186; *In re Short's Estate* (1851) 16 Pa. St. 63; *Carpenter v. Pennsylvania* (1854) 17 How. 456; *Peters v. Lynchburg* (1882) 76 Va. 927; *Schoolfield v. Lynchburg* (1884) 78 Va. 366; *Arnaud's Heirs v. His Executor*, 3 La. 337. See, also, *Minot v. Winthrop* (1894) 162 Mass. 116, 38 N. E. 512; distinguishing *Curry v. Spencer*, 61 N. H. 624; *State v. Hamlin* (1894) 86 Me. 507, 30 Atl. 76; *In re Sherrill's Estate* (1891) 125 N. Y. 379, 26 N. E. 464; *In re Romaine*, 127 N. Y. 80, 27 N. E. 759; *In re Hoffman's Estate* (1894) 143 N. Y. 327, 38 N. E. 311; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401; *State v. Ferris* (April, 1895) 9 Ohio Cir. Ct. R. 299, affirmed as *State of Ohio ex rel. v. Ferris*, 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352 (the opinion will be published in the N. E. Rep. as soon as handed down).

<sup>6</sup> See statutes of New York, Pennsylvania, Maryland, Connecticut, Maine, Massachusetts, California, Ohio, Illinois, and New Jersey, Appendix, I.-X.

<sup>7</sup> *Eyre v. Jacob*, 14 Grat. (Va.) 427.

<sup>8</sup> *Eyre v. Jacob*, 14 Grat. (Va.) 428-430.

cedent's estate, either by will or descent, to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relatives may be permitted to take it, or may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that, upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses. Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it, can be successfully questioned. That the tax is confined to collateral inheritances and devises to others than those specified presents no difficulty. It is the will of the legislature to make this discrimination, and its discretion upon the subject must be regarded as having been duly and properly exercised."

So when the question came before the supreme court of the United States in a case involving an alleged conflict with a treaty, Taney, C. J.,<sup>9</sup> considered the law to be nothing more than the exercise of the power, possessed by every state, of regulating the manner and terms upon which property, real and personal, within its domain, may be transmitted by will or inheritance, and of prescribing who shall and who shall not be capable of taking it.

And, in Pennsylvania, when the constitutional question finally came before the supreme court of the state in 1866,<sup>10</sup> it received elaborate consideration, and was sustained upon

<sup>9</sup> *Mager v. Grima*, 8 How. 490.

<sup>10</sup> *Strode v. Com.*, 52 Pa. St. 181; *Clymer v. Com.*, Id. 189. See, also, *In re Short's Estate*, 16 Pa. St. 63; *Com. v. Herman*, 16 Wkly. Notes Cas. 211, 212.

precisely the same grounds as those advanced in *Eyre v. Jacob*.<sup>11</sup>

The court adopted the opinion of Butler, C. J., in the court below. He said: "The estate does not belong to them [collaterals, etc.], except as a right to it is conferred by the state. Independent of the government, no such right could exist. The death of the owner of property would necessarily terminate his control over it, and it would pass to the first who might obtain possession. The right of the owner to transfer it to another, after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the state sees fit to impose."<sup>12</sup>

Chapman, J., in the same case, considered that, as the legislature had the power to regulate the laws of descent and inheritance, it had also the right, as a condition, of making itself a kind of beneficiary without consideration, and to claim a share of the property, whether exacted as a tax or duty.

So the same conclusions have been reached in recent cases in Maine, Massachusetts, New York, Pennsylvania, and other states.<sup>13</sup>

<sup>11</sup> *Supra*.

<sup>12</sup> Citing Bl. Comm. bk. 2, pp. 10-13.

<sup>13</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 116, 38 N. E. 512, distinguishing *Curry v. Spencer*, 61 N. H. 624; *State v. Hamlin* (1894) 86 Me. 501, 30 Atl. 76; *In re Hoffman's Estate* (1894) 143 N. Y. 327, 38 N. E. 311; *In re Sherwell's Estate* (1891) 125 N. Y. 379, 26 N. E. 464; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505; *In re Cullum's Estate*, 5 Misc. Rep. 173, 25 N. Y. Sup. 700, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163, mem.; *Small's Estate* (1892) 151 Pa. St. 1, 25 Atl. 23. And see elaborate note on the subject in 32 Am. Law. Reg. (N. S.) 364, 366. See, also, *In re Corning's Estate*, 3 Misc. Rep. 160, 23 N. Y. Supp. 285; *In re Thomas*, 3 Misc. Rep. 388, 24 N. Y. Supp. 713. *Contra*, *Chambe v. Durfee* (1895) 100

In a recent case in Massachusetts, where the law was upheld upon this ground,<sup>14</sup> the supreme court per Field, C. J., said: "The descent or devolution of property on the death of the owner \* \* \* has always been regulated by law. We have no occasion in these cases to consider whether the legislature has the power to make the commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes, not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. We assume that under the constitution this cannot be done, either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, \* \* \* or legatees; that the great mass of all the property of the inhabitants must become vested in the commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way. Under our system of law the right to make a will or testament, and the right to transmit or take property by descent, are now mainly, if not wholly, regulated by law.<sup>15</sup> If, under the power to regulate the devolution of

Mich. 112, 58 N. W. 661; *State v. Mann* (1890) 76 Wis. 469-478, 45 N. W. 526, and 46 N. W. 51; *State v. Ferris* (April, 1895) *supra*, p. 32.

<sup>14</sup> See Appendix, IV., Laws Mass. 1891, c. 425; *Minot v. Winthrop*, *supra*.

<sup>15</sup> Citing *Mager v. Grima*, 8 How. 490, 493; *Brettun v. Fox*, 100 Mass. 234.

property on the death of the owner, the legislature cannot take away altogether the inheritable quality of property, yet such regulations as are thought reasonable concerning the persons who can take or transmit real or personal property, by will or inheritance, have been made in every civilized state. Taxes on legacies and inheritances, or on succession in any form to property on the death of the owner, have generally been considered, not as taxes upon property, but as excises upon the privilege of taking or transmitting property in this way."

So with regard to the statute of Maine passed in 1893,<sup>16</sup> the same result has been reached by the supreme court of that state.<sup>17</sup>

In reviewing the cases, Strout, J., said: "The tax provided for in the statute under consideration is clearly an excise tax.<sup>18</sup> The whole tenor and scope of the act is one of excise, and not a tax upon property, as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. It is true that the act contains some language indicating a tax upon property; but it should be construed according to its essential principle, object, and effect. Substance, and not form or phrase, is the important thing. All exactions of money by the government are taxes; but they are not all levied by assessment upon values. \* \* \* The tax, under this statute, is, once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the state."

<sup>16</sup> Laws 1893, c. 146. See Appendix, V.

<sup>17</sup> *State v. Hamlin*, 86 Me. 495, 30 Atl. 76.

<sup>18</sup> *Scholey v. Rew*, 23 Wall. 346. See, also, *State v. Ferris*, *supra*.

In a recent case in Ohio,<sup>19</sup> the court said: "The right of the general assembly, under the provisions of section 1 of article 11,<sup>20</sup> which vests the legislative power of the state in such body to impose excise taxes, must, under the decisions of the supreme court of the state, be fully recognized, and, if imposed in accordance with the general principles which underlie the constitution, must be held to be valid."

With the exception of *Curry v. Spencer*,<sup>21</sup> the constitutionality of the inheritance tax as a tax upon the privilege or right of inheritance or as an excise has not been seriously questioned. Even in that case, and in others where these statutes have been declared unconstitutional, it will be found to have been on the ground of a violation of specific provisions of the state constitution, or of the constitution of the United States.<sup>22</sup>

Inasmuch as it is lawful for the state to abolish altogether the privilege of acquiring property within its dominion, by will or inheritance, it is lawful for the legislature to annex any conditions to the privilege which may seem expedient, and do not conflict with the organic law of the state, or with the constitution or laws of the United States.<sup>23</sup>

<sup>19</sup> *State v. Ferris* (April, 1895) *supra*, p. 32; affirmed 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352.

<sup>20</sup> Const. Ohio.

<sup>21</sup> 61 N. H. 624 (1882).

<sup>22</sup> See *Chambe v. Durfee* (1894) 100 Mich. 112, 116, 58 N. W. 661; *State v. Gorman* (1889) 40 Minn. 232, 41 N. W. 948; *Mearkle v. Hennepin Co. Com'rs* (1890) 44 Minn. 546, 47 N. W. 165; *Van Riper v. Happenheimer* (Feb., 1894) 17 N. J. Law J. 49; *In re Dobermiller* (Dec., 1894) *Id.* 378; *State v. Ferris* (April, 1895) *supra*.

<sup>23</sup> *Wallace v. Myers*, 38 Fed. 184; *In re Sherwell's Estate* (1891) 125 N. Y. 379, 26 N. E. 464; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 10 Sup. Ct. 533.

## § 9. Nature of Tax in New York, under Act of 1892.

So, under recent decisions in New York, construing the transfer tax act passed in 1892,<sup>24</sup> notwithstanding the various changes in phraseology contained in the new act, the nature of the tax is not changed, and it is still a tax upon the privilege or right of succession by will or intestacy.<sup>25</sup>

Notwithstanding that Gray, J.,<sup>26</sup> in construing the act of 1887, endeavored to show that the statute imposed a property tax, the other judges did not agree with him, as was stated in the opinion: "My brethren are of the opinion that the tax imposed under the act is a tax on the right of succession under a will, or by devolution in case of intestacy,—a view of the law which my consideration precludes my assenting to."<sup>27</sup>

And when the subject was considered later by the court in *Re Hoffman*,<sup>28</sup> Finch, J., said: "In construing the collateral inheritance tax law as it stood prior to the act of 1892, we had occasion to decide that it imposed a tax upon the right of succession to the property of the testator or intestate, which vested in the successors severally, and in their respective shares or proportions, and not upon the property or estate of the decedent. The shares received in the hands

<sup>24</sup> See Appendix, I., Laws N. Y. 1892, c. 399.

<sup>25</sup> *In re Hoffman's Estate* (1894) 143 N. Y. 327, 38 N. E. 311; *In re Swift* (1893) 137 N. Y. 77, 32 N. E. 1096, affirming (Sup.) 19 N. Y. Supp. 292; *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505; *In re Cullum's Estate*, 5 Misc. Rep. 173, 25 N. Y. Supp. 700, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163, mem.; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>26</sup> *In re Swift*, supra.

<sup>27</sup> 137 N. Y. 88, 32 N. E. 1096.

<sup>28</sup> 143 N. Y. 327, 38 N. E. 311.



of the recipients were the measures of the right which was subjected to assessment, and the imposed tax could be enforced personally against the successor charged. \* \* \* The act of 1892 was a revision of the whole law upon the subject. It was passed with knowledge of our decisions, and in view of our construction, and was obviously intended, in some respects, to compel on our part different conclusions. I do not think there was any such purpose so far as our general doctrine as to the nature of the tax is concerned. There are some changes of phraseology in the more important sections, but I think it remains true that the tax is one upon the right of succession, levied upon successors in respect to the shares to which they succeed, and not upon the decedent's estate as such."

The court conceded, however, that while the general rule regarding the nature of the tax had not been modified, the definition of the word "property" contained in <sup>29</sup> the act had the effect of limiting the exemption declared <sup>30</sup> in favor of lineal successors to estates where the aggregate property of the decedent transferred amounts to less than \$10,000; and where several lineals succeed to personal property amounting in the aggregate to more than \$10,000, their interests are taxable, though each beneficiary may succeed to less than that amount. The tax is under this act declared to be upon the aggregate estate or property of the decedent, passing to taxable persons or interests, and not upon the separate share of the devisee or legatee; and where the estate passes to collaterals and strangers to the blood, and is worth \$500 or more, it is taxable, notwithstanding the legatees take less than that sum. Where it passes to lineal heirs, and the aggregate estate is personalty worth \$10,000 or more, it is also taxable, although the separate shares are

<sup>29</sup> Section 22, c. 399, Laws 1892.

<sup>30</sup> By section 2, c. 399, Laws 1892.

less.<sup>31</sup> This is the rule adopted under the statute of Pennsylvania.<sup>32</sup> And in New York it overrules the earlier cases under the statutes in existence prior to the act of 1892.<sup>33</sup>

## § 10. A Tax upon a "Commodity" in Massachusetts.

In Massachusetts the constitution provides<sup>34</sup> that the state may levy duties and excises "upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the commonwealth."

Under this provision it has been held that the privilege of transmitting and receiving, by will or descent, property on the death of the owner, is a "commodity" within the meaning of the constitution, and that an excise in the nature of an inheritance tax may be laid upon it.<sup>35</sup>

## § 11. Under the Constitution of Minnesota.

In Minnesota, by recent amendment to the constitution,<sup>36</sup> it is provided that there may be, by law, levied and collected a tax upon all inheritances, devises, bequests, legacies, and gifts of every kind and description, above a fixed and specified sum, of any and all natural persons and corporations.

<sup>31</sup> In re Hoffman, 143 N. Y. 327, 38 N. E. 311; In re Hall's Estate (Sup.) 34 N. Y. Supp. 616.

<sup>32</sup> Chapter 3, § 41.

<sup>33</sup> See In re Hoffman's Estate, supra; also In re Cager's Will, 111 N. Y. 345, 18 N. E. 866; In re Howe, 112 N. Y. 100, 19 N. E. 513.

<sup>34</sup> Part 2, c. 1, § 1, art. 4.

<sup>35</sup> Minot v. Winthrop (1894) 162 Mass. 113, 38 N. E. 512.

<sup>36</sup> Adopted November 6, 1894. See 1 St. Minn. 1894, Const. art. 9, § 1. See note on proposed tax, 2 Minn. Law J. (May, 1894) 123. This provision was evidently inserted to meet the ruling in State v. Gorman, 40 Minn. 232, 41 N. W. 948.

Such a tax, above such exempted sum, may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of 5 per cent.

## § 12. Under the Federal "Income Tax" of 1894.

Under the act of congress passed August 28, 1894, a tax of 2 per cent. was imposed upon all gains, profits, and incomes received from "money and the value of all personal property acquired by gift or inheritance."<sup>37</sup> While this provision of the act would have given rise to much litigation on account of its obscure and ambiguous language, it was not a proper tax to associate with the income tax system. As the whole act has, however, been declared unconstitutional, no practical purpose is accomplished by the discussion of that part of the act relating to the inheritance tax.<sup>38</sup>

## § 13. Not a Property Tax.

In accordance with the views given above, it has been uniformly held that the tax is not a property tax within the meaning of the various provisions of the federal and state constitutions.<sup>39</sup>

<sup>37</sup> Section 28.

<sup>38</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673.

<sup>39</sup> See cases, section 2, *supra*; also, *In re Sherwell's Estate* (1891) 125 N. Y. 379, 26 N. E. 464; *In re Knoedler's Estate* (1893) 140 N. Y. 379, 35 N. E. 601; *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505; *In re Cullum's Estate*, 5 Misc. Rep. 173, 25 N. Y. Supp. 700, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163; *State v. Hamlin* (1894) 86 Me. 495, 30 Atl. 76; *In re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548; *In re Carver's Estate* (1893) 25 N. Y. Supp. 991, 5 Misc. Rep. 173; *In re Swift* (1893) 137 N. Y. 77, 88, 32 N. E. 1096, Gray, J., dissenting; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, 28; *State v. Ferris* (April, 1895) 9 Ohio Cir. Ct. R.

It was said by Lee, J.:<sup>40</sup> "The property tax which the framers of the constitution were contemplating \* \* \* was the ordinary annually recurring tax for the support of government, laid upon all property whatsoever. They had no reference to casual subjects of taxation occurring irregularly and occasionally, which, though connected with property, were yet readily to be distinguished in their essential character and features."<sup>41</sup>

And in a recent case in New York, where the constitutionality of the act was in question, the same views were announced, and a majority of the court went so far as to hold that it was not important to determine whether the act was to be regarded as imposing a tax on property or upon the succession or devolution of property by will or intestacy; whether one or the other, it was held constitutional in all respects.<sup>42</sup>

Whether the object of taxation be regarded as the property which passes or the person who takes it is a wholly immaterial question. The legislature is not restricted in the selection of its subjects for the raising of revenue for

299, affirmed as *State of Ohio ex rel. v. Ferris*, 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352. The opinion will be published in the N. E. Rep. as soon as handed down. See note to 32 Am. Law Reg. (N. S.) 364, where the author says: "In view of the federal decisions fixing the status of this form of taxation, it seems absurd to regard succession charges as property taxes. \* \* \* It is upon the idea that the tax is the price paid for the privilege of succession that its constitutionality has been upheld when applied to the transmission of United States securities."

<sup>40</sup> *Eyre v. Jacob*, supra. And see *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *Com. v. Maury*, 82 Va. 883, 1 S. E. 185.

<sup>41</sup> See, also, *State v. Hamlin*, 86 Me. 502, 30 Atl. 76.

<sup>42</sup> *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *Wallace v. Myers*, 38 Fed. 184. See *In re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *In re Howard*, 5 Dem. Sur. 483; *In re Sherwell's Estate* (1891) 125 N. Y. 379, 26 N. E. 464, affirming (Sup.) 12 N. Y. Supp. 200.

state uses. In such respects it is sovereign, and is without other control than the restrictions found in the fundamental law of the state.<sup>43</sup>

In another case in North Carolina the court seem to have reached the conclusion that the tax was not a property tax, but one upon the succession to property, without being aware of any previous authority upon the question.<sup>44</sup>

So a tax upon a legacy to the United States government is not a tax upon federal property within the prohibitions of the federal constitution.<sup>45</sup> Nor is this a tax upon real or personal property, under the constitution of Maine.<sup>46</sup>

#### § 14. Not a Direct Tax.

Nor is it a direct tax upon land, taken by descent, within the meaning of the federal constitution, but it is more in the nature of an impost or excise upon the devolution of the estate, or the right to become beneficially entitled thereto, or to the income thereof.<sup>47</sup>

#### § 15. Taxing Foreign Real Estate—When Void as Direct Tax.

But as real estate is not drawn to the person or domicile of the owner for taxation, it cannot be taxed directly by these laws, outside the jurisdiction where it is situ-

<sup>43</sup> In *re* Sherwell's Estate, *supra*.

<sup>44</sup> *Pullen v. Commissioners of Wake Co.* (1872) 66 N. C. 363.

<sup>45</sup> In *re* Merriam's Estate (1894) 141 N. Y. 484, 36 N. E. 505; In *re* Cullum's Estate, 5 Misc. Rep. 173, 25 N. Y. Supp. 700, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163, *mem.* See 32 Am. Law Reg. (N. S.) 364, 366.

<sup>46</sup> Const. Me. art. 9, § 8; *State v. Hamlin* (1894) 86 Me. 495, 30 Atl. 76.

<sup>47</sup> *Scholey v. Rew* (1874) 23 Wall. 331. See, also, *Strode v. Com.*, *supra*; *Com. v. Herman*, 16 Wkly. Notes Cas. 211, 212; *Minot v. Win-*

ated. Such a tax is a direct tax upon the thing devised in the hands of the devisee, and it is a tax which the state is powerless to enforce, hence the collateral inheritance law of Pennsylvania, passed in 1887, which sought to tax real estate situated in Maryland, was, pro tanto, held unconstitutional, or, at least, incapable of enforcement.<sup>48</sup>

In Commonwealth's Appeal,<sup>49</sup> Paxson, J., said: "While it is conceded that the powers of the state for taxing purposes are very great, they are necessarily limited to either property or persons within her borders. All property of the citizen within the state may be taxed, and all such property outside the state as is drawn to or follows in law the person or domicile of the owner, such as bonds and mortgages, moneys at interest, etc., no matter where situate. \* \* \* It may be that the state might impose a succession tax upon every citizen of the state who succeeds to either real or personal property, from whatever source derived. This is not such a tax. \* \* \* It is a direct tax upon the thing devised in the hands of the devisee, a tax which the state is powerless to enforce."<sup>50</sup>

throp (1894) 162 Mass. 113, 38 N. E. 512; *State v. Hamlin* (1894) 86 Me. 502, 30 Atl. 76.

<sup>48</sup> Appeal of Commonwealth (*Bittinger's Estate*; 1889) 129 Pa. St. 338, 18 Atl. 132, distinguishing *Com. v. Smith*, 5 Pa. St. 142. The court declined to pass upon the constitutional question raised by the title of the act. See *Del Busto's Estate*, 23 Wkly. Notes Cas. 111. See, also, *Com. v. Coleman*, 52 Pa. St. 468; *Kintzing v. Hutchinson* (U. S. Cir. Ct.; 1877) 34 Leg. Int. 365, Fed. Cas. No. 7,834; *Drayton's Appeal*, 61 Pa. St. 172; *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492; *Hood's Estate*, 21 Pa. St. 106; *In re Hale's Estate* (1894) 161 Pa. St. 181, 28 Atl. 1071. See *Williamson's Estate* (1893) 153 Pa. St. 508, 26 Atl. 246, and 32 Am. Law Rev. (N. S.) 472, and note by H. W. Page. *In re Wolfe's Estate*, 19 N. Y. St. Rep. 263; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

<sup>49</sup> Appeal of Commonwealth, *supra*.

<sup>50</sup> But see *In re Howard*, 5 Dem. Sur. 483; *In re McPherson*, 104 N. Y. 306, 10 N. E. 685.

This rule does not, however, apply where land outside of the taxing state is directed by will to be converted into personalty.<sup>51</sup> It is then deemed personalty, and in some states is subject to the tax law of the owner's domicile.<sup>52</sup>

The contrary view of this subject has been taken under the New York statutes, but the law of equitable conversion has not been thoroughly considered in that state with reference to the inheritance tax.<sup>53</sup>

## § 16. As to Being a General or Special Tax Law.

It has been held to be a general, and not a special, law, and thus constitutional, as such, within the law of Maryland;<sup>54</sup> while in New York, and some other states, it has been held to be a special tax, but valid as such.<sup>55</sup>

The constitution of Michigan<sup>56</sup> provides that all specific taxes, except those received from certain mining companies,

<sup>51</sup> See the subject considered chapter 4, § 46, subd. (b).

<sup>52</sup> *Miller v. Com.* (1886) 111 Pa. St. 321, 2 Atl. 492; *Williamson's Estate* (1893) 153 Pa. St. 508, 26 Atl. 246, and 32 Am. Law Rev. (N. S.) 472, and note by H. W. Pagé, Esq., entitled "Collateral Inheritance Tax. Conversion of Land outside of State." See, also, *Hale's Estate* (1894) 161 Pa. St. 181, 28 Atl. 1071, where the preceding cases are distinguished. See *In re Howard*, 5 Dem. Sur. 486; *In re Wheeler's Estate*, 1 Misc. Rep. 450, 22 N. Y. Supp. 1075, 1078, and cases cited. Chapter 4, § 46 (b). Contra, *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *In re Secor's Estate*, N. Y. Law J. (June 22, 1893) p. 779.

<sup>53</sup> See cases *supra*. Also, *In re Raymond* (Nov. 19, 1894) 12 N. Y. Law J. 453; *Sherrill v. Christ Church* (1890) 121 N. Y. 701, 25 N. E. 50; *In re Curtis*, 142 N. Y. 221, 36 N. E. 887; *Hale's Estate*, *supra*.

<sup>54</sup> *Montague v. State* (1880) 54 Md. 482.

<sup>55</sup> *In re McPherson* (1887) 104 N. Y. 306, 10 N. E. 685; *In re Will of Enston*, 113 N. Y. 178, 21 N. E. 87; *Eyre v. Jacob*, 14 Grat. 436; *Tyson v. State* (1868) 28 Md. 577; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Sherwell's Estate* (1891) 125 N. Y. 379, 26 N. E. 464, affirming 58 Hun, 608, 12 N. Y. Supp. 200.

<sup>56</sup> Article 14, § 1.

shall be applied in paying interest on certain educational funds and the state debt, until paid, and thereafter shall be added to the primary school interest fund.

The act of that state, passed in 1893,<sup>57</sup> taxing certain transfers of property by gift or inheritance, and providing that the taxes collected thereunder should be paid into the state treasury, and applied "to the expenses of the state government and to such other purposes as the legislature shall by law direct," was declared unconstitutional as conflicting with the above provisions.<sup>58</sup>

### § 17. Not a Poll Tax.

It is not within the constitutional prohibition against levying a poll tax, exempting paupers, etc.<sup>59</sup>

### § 18. As to Being an Equal and Uniform Tax.

Nor does a law imposing such tax conflict with a general constitutional requirement that all taxes shall be equal and uniform within the state, or apportioned and assessed equally.<sup>61</sup>

<sup>57</sup> Act No. 205, Pub. Acts 1893, p. 344.

<sup>58</sup> *Chambe v. Durfee* (1894) 100 Mich. 112, 58 N. W. 661.

<sup>59</sup> *Tyson v. State*, 28 Md. 577.

<sup>61</sup> *Eyre v. Jacob* (1858) 14 Grat. 427; *Tyson v. State*, 28 Md. 577; *Pullen v. Commissioners of Wake Co.* (1872) 66 N. C. 361; *Peters v. City of Lynchburg* (1882) 76 Va. 927; *Schofield v. City of Lynchburg* (1884) 78 Va. 367; *State v. Hamlin* (1894) 86 Me. 502, 30 Atl. 76; *Minot v. Winthrop* (1894) 162 Mass. 116, 38 N. E. 516. Contra, *Curry v. Spencer*, 61 N. H. 630, where *Blodgett, J.*, criticising *Eyre v. Jacob* and *Tyson v. State*, *supra*, said: "It is apparent that these decisions can have no weight in New Hampshire; and immunity from disproportional taxation being expressly reserved in our bill of rights, and the power of proportional taxation only being granted to the legislature by the constitution, we are unaware of any ground upon which



These provisions contemplate only the general recurring assessment upon the same property, and do not include occasional, exceptional, and special subjects and modes of taxation, like the inheritance and other privilege taxes.<sup>62</sup>

The terms "equal" and "uniform" apply only to a direct tax on property, and do not limit the power of the legislature as to the object of the tax. They are intended to prevent an arbitrary tax on property, according to kind or quality, without regard to value.<sup>63</sup>

While providing for a uniform mode of taxation on property, it was not the purpose of the constitution to prohibit any other species of tax, but to leave the legislature the power to impose such other taxes as the interests of the government might require.<sup>64</sup>

Where the tax is made to apply to every estate which is bequeathed or devised to, or inherited by, the person specified in the act, it is equal, and free from objections on legal

the statute under consideration can be upheld; for, if it is to be regarded as a tax on property, it is open to the objection of unequal and double taxation, and if it is to be regarded as a tax on a civil right or privilege it is discriminating and disproportional." It may be said that this decision is in conflict with every well-considered adjudication upon this subject. See *State v. Ferris* (April, 1895) 9 Ohio Cir. Ct. R. 299, affirmed as *State ex rel. v. Ferris*, 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352. Opinion will be published in N. E. Rep. as soon as handed down.

<sup>62</sup> *State v. Hamlin*, supra.

<sup>63</sup> *Id.*; decisions supra.

<sup>64</sup> *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, supra; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 10 Sup. Ct. 533. A statute of Minnesota requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums arbitrarily prescribed with reference to the value of the estate, held unconstitutional, being contrary to the requirement of equality of taxation and the dispensation of justice freely and without purchase. *State v. Gorman*, 40 Minn. 232, 41 N. W. 948; *State v. Mann*, 76 Wis. 469, 45 N. W. 530; *Bradford v. Jones*, 1 Md. 308; *Harrison v. Willis*, 7 Heisk. 35.

grounds.<sup>65</sup> So in *Minot v. Winthrop*<sup>66</sup> the court said, in referring to the Massachusetts statute: "The tax imposed by the statute we are considering is said to be unequal because it is not imposed upon all estates, and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred or strangers in blood and kindred in the direct lines in reference to the assessment of such a tax, either by exempting the kindred in the direct line, or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all states which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount."

The direct inheritance tax of Ohio<sup>67</sup> has been declared unconstitutional, as violating the rule of uniformity and equality, in that the exemptions under the act were restricted to estates of a certain class, and did not include all persons.

Smith, J., in the lower court, said: "But all laws comprising such excise taxes must, in accordance with the reason and spirit of the constitution, be uniform in their operation."<sup>68</sup> \* \* \* Nor can they be upheld if substantially and necessarily unequal and unjust. In our judgment, the statute in question is in contravention of this principle. It provides<sup>69</sup> that 'when the value of the entire property of such decedent exceeds the sum of \$20,000, and

<sup>65</sup> *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464.

<sup>66</sup> *Supra*.

<sup>67</sup> Appendix, VI. c, Act 1894 (91 Ohio Laws, p. 166.)

<sup>68</sup> Citing *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 160.

<sup>69</sup> Laws Ohio 1894, p. 166, § 1, Appendix, VI. b.

does not exceed the sum of \$50,000, the tax shall be one per cent.; when it exceeds \$50,000, and does not exceed \$100,000, one and one-half per cent.; and then it proceeds to fix higher rates of taxes on higher grades. There is no exemption to all persons of taxes on property of the value of \$20,000, but if the amount or value of the property which so passes is less than \$20,000 no tax is imposed thereon. But if the amount or value of the estate be over \$20,000, say \$20,001, then the tax must be paid on the whole sum, and not simply on the amount over \$20,000. And thus in the first case the person taking the estate would receive the whole amount thereof, while in the other case he would receive but \$19,800, which seems manifestly unequal and unjust. If the statute exempted \$20,000 (or any other sum) of every estate from taxation, it would, in our judgment, be equal and valid, even in imposing a graded tax, as it does. But, as it stands, we are of the opinion that it violates the principle of uniformity and equality which must be found in all laws imposing taxes of every kind."<sup>70</sup> But such act was held not in conflict with the constitution,<sup>71</sup> providing that "all laws of a general nature shall have a uniform operation throughout the state."<sup>72</sup> Upon appeal to the supreme court,\* Burke, J., held that the act, by its exemption from taxation of the right to receive or succeed to estates not exceeding \$20,000 in value, and taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and in taxing at a higher rate per centum the right to receive or succeed to estates of larger value than to estates of smaller value, was in conflict with section 2 of the bill of rights of the constitution of Ohio, declaring that "all political power is inherent in the people. Government is instituted for their equal protection and benefit"; and the whole act was

<sup>70</sup> State v. Ferris, *supra*.<sup>72</sup> State v. Ferris, *supra*.<sup>71</sup> Const. Ohio, art. 11, § 26.\* State v. Ferris, *supra*.

therefore declared unconstitutional and void. It was also held that the first section of the fourteenth amendment to the federal constitution, providing that no state shall "deny to any person \* \* \* the equal protection of the laws," was not broader than the second section of the state bill of rights. A statute somewhat similar to that of Ohio is now in force in Illinois, having gone into effect July 1, 1895.<sup>73</sup>

### § 19. Double Taxation.

There is nothing in the federal constitution that forbids double or unequal taxation by a state.<sup>74</sup> Hence, the privilege under these laws may be taxed, although the property is also taxed;<sup>75</sup> and it makes no difference that the same tax is imposed upon the succession in another state.<sup>76</sup>

The result of double taxation, however, is one which the courts are inclined to avoid, whenever it is possible, within reason, to do so.<sup>77</sup>

<sup>73</sup> See statute, Appendix, X.

<sup>74</sup> *Davidson v. New Orleans*, 96 U. S. 97-106; *In re Enston's Will*, 113 N. Y. 182, 21 N. E. 87; *Bemis v. Boston*, 14 Allen, 368; *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488. As to double taxation, see 5 *Political Science Quarterly* (Dec., 1890) 637.

<sup>75</sup> *Eyre v. Jacob*, 14 Grat. 427. *Contra*, *Curry v. Spencer*, 61 N. H. 630.

<sup>76</sup> *Com. v. Sharpless*, 2 Chest. Co. Rep. (Pa.) 246; *Com. v. Schumacher*, 9 Lancaster Bar (Pa.) 199. But see *In re Enston's Will*, *supra*; *Bonaparte v. Tax Court*, 104 U. S. 595; *In re Strong*, 17 N. J. Law J. 234.

<sup>77</sup> *In re James* (1894) 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351, and 6 Misc. Rep. 206, 27 N. Y. Supp. 288. See *In re Coleman's Estate* (1893) 159 Pa. St. 231, 28 Atl. 137.

## § 20. Not a Taking of Private Property, etc.

Nor is it a taking of private property without compensation.<sup>78</sup>

The statute of Maine<sup>79</sup> does not conflict with the state constitution<sup>80</sup> prohibiting the taking of private property for public uses without just compensation. The latter provision is limited to the exercise of the right of eminent domain, and does not extend to the subject of taxation.<sup>81</sup>

Nor does this statute conflict with the constitution of the state,<sup>82</sup> that no person shall be deprived of his property or privileges but by judgment of his peers, or by the law of the land.<sup>83</sup>

The provisions of the New York constitution, that no person shall be deprived of property without due process of law, nor property taken for public use without just compensation, have no application to the exercise of the taxing power.<sup>84</sup>

## § 21. Need not State Object of Tax.

It is not necessary that the act should state the object of the tax, or to what purpose it is to be applied, under the New York constitution, as that provision was only intended to apply to the annually recurring taxes known at the time of the constitution's adoption.<sup>85</sup> In Michigan, however, a

<sup>78</sup> *Strode v. Com.* (1866) 52 Pa. St. 186; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419.

<sup>79</sup> Appendix, V.

<sup>80</sup> Article 1, § 21.

<sup>81</sup> *State v. Hamlin* (1894) 86 Me. 501, 30 Atl. 76.

<sup>82</sup> Article 1, § 6.

<sup>83</sup> *State v. Hamlin*, *supra*.

<sup>84</sup> *People v. Mayor, etc., of Brooklyn*, *supra*.

<sup>85</sup> *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *s. p.*, *Eyre v. Jacob*, 14 Grat. 427.

statute was held void for failure to distinctly state the tax and the object to which it was to be applied.<sup>86</sup> And in New Jersey the statutes<sup>87</sup> have been declared unconstitutional and void so far as they attempt to tax devises of land, for the reason that the titles of the acts do not express a purpose to include real estate.<sup>88</sup> The defect indicated is, however, avoided by the act of 1894,† but this statute does not apply to property passing by will before the act was approved.‡

## § 22. As to Notice and Hearing.

But parties against whom it is sought to assess the tax have a constitutional right to notice, and to an opportunity for a hearing upon the assessment. It would seem that all the statutes upon this subject sufficiently provide for such notice and hearing, so as to obviate any constitutional objection, either under the state constitutions or under the fourteenth amendment to the federal constitution.<sup>89</sup>

The statute of Maine<sup>90</sup> does not conflict with the latter provision.

"The act<sup>91</sup> provides for an appraisal of the estate subject

<sup>86</sup> Const. Mich. art. 14, § 14; *Chambe v. Durfee* (1894) 100 Mich. 112, 58 N. W. 661.

<sup>87</sup> See Appendix, II.

<sup>88</sup> *Van Riper v. Happenheimer*, 17 N. J. Law J. (Feb., 1894) 49; *In re Dobermiller, Id.* (Dec., 1894) 378.

† Appendix, II.

‡ *State v. Hancock* (N. J.; 1895) 32 Atl. 689.

<sup>89</sup> *Cooley, Tax'n* (2d Ed.) 362, 363; *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *Wallace v. Myers*, 38 Fed. 184, citing *Railroad Co. v. Richmond*, 96 U. S. 521; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57; *State v. Hamlin* (1894) 86 Me. 507, 30 Atl. 76.

<sup>90</sup> See Appendix, V.

<sup>91</sup> Section 12, Appendix, V

to the excise, upon application to the probate court, by the state assessors, or any person interested in the estate; and <sup>92</sup> the probate court having jurisdiction of the settlement of the estate is authorized to 'hear and determine all questions in relation to said tax that may arise,' etc., 'subject to appeal as in other cases.' These provisions fully secure the rights of all parties interested, and satisfy the requirements of 'due process of law.' <sup>93</sup>

### § 23. Due Process of Law not Violated.

Nor do these statutes violate the provisions of the fourteenth amendment to the constitution, prohibiting any state from depriving any person of life, liberty, or property without due process of law. <sup>94</sup>

The provisions of the New York constitution that no person shall be deprived of property without due process of law, nor property taken for public use without just compensation, have no application to the exercise of the taxing power. <sup>95</sup>

The statute of Maine <sup>96</sup> does not conflict with the state constitution, <sup>97</sup> providing that no person shall be deprived of his property or privileges but by judgment of his peers, or by the law of the land. <sup>98</sup>

Nor does this statute conflict with the provision of the fourteenth amendment to the constitution of the United States, providing that "no state shall make or enforce any

<sup>92</sup> Section 13.

<sup>93</sup> *State v. Hamlin* (1894) 86 Me. 507, 30 Atl. 76.

<sup>94</sup> *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *State v. Hamlin*, *supra*.

<sup>95</sup> *People v. Mayor of Brooklyn*, 4 N. Y. 419.

<sup>96</sup> Appendix, V.

<sup>97</sup> Article 1, § 6.

<sup>98</sup> *State v. Hamlin*, *supra*.

law which shall abridge the privileges or immunities of citizens of the United States.”<sup>99</sup>

In Ohio, however, under the direct inheritance tax,<sup>100</sup> it has been recently held that the act was invalid, as being in contravention of that part of the United States constitution<sup>101</sup> which provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>102</sup>

## § 24. As to Being Retroactive and Ex Post Facto.

In Maryland an interesting question<sup>103</sup> arose as to the constitutional effect of a statute of that state releasing the rights of the state to claims for the tax against husbands, who, under a previous law, had been made liable where such claims had not been actually paid. It was contended by the state that the act was retroactive and unconstitutional, as against the state, as violating the rule of equality between those husbands who had actually paid the tax before the repealing law was passed, and those who had refused, and thus obtained its benefits.

But the court said: “If the legislature is satisfied that a given tax is no longer necessary, that it is unjust, that a change of circumstances requires its repeal, that public policy demands that the repeal shall be prompt, should give instant relief, and should therefore extend to all who have not yet actually paid, the legislature has, in its discretion, the constitutional right so to enact, without being at the same time compelled to embarrass the treasury by a sweeping restriction to all who had paid the tax from the time of

<sup>99</sup> State v. Hamlin, *supra*.

<sup>100</sup> See Appendix, Laws Ohio 1894.

<sup>101</sup> Article 14, § 1.

<sup>102</sup> State v. Ferris, *supra*, pp. 47, 49.

<sup>103</sup> Montague v. State, 54 Md. 486.



its imposition. Under some circumstances such a retrospective exemption might be highly expedient, and under others not. The question is of policy, and not of law for the courts."<sup>104</sup>

The legislature may release property which has been assessed for taxation. The power over the subject is unlimited, and can be exercised in any way and at any time during the proceedings for taxation.<sup>105</sup>

In Pennsylvania an amendatory statute of 1850 (amending Act 1826) provided that the estates of persons domiciled there who died before the passage of the act of 1850 "shall be so construed as to relate to all persons who have been at the time of their decease or now may be domiciled within this commonwealth, as well as to estates." It was held that the act was retroactive, but constitutional as to estates within the state, and that under it stocks and moneys held abroad were liable to the tax, to be paid out of the assets in the hands of the executors.<sup>106</sup>

In *Short's Case* <sup>107</sup> the court said: "The argument has been

<sup>104</sup> *Montague v. State*, 54 Md. 486. Many retroactive or retrospective exemptions have been made in New York, particularly as regards adopted children, and those standing in the so-called relation of parent and child. Laws 1885, c. 483, § 1; Laws 1887, c. 713; Laws 1889, c. 479. Also, under the act of 1891, c. 215; Laws 1892, c. 169; Laws 1892, c. 399, § 1, subd. 3; *Id.* § 2. See these retroactive clauses discussed in chapter 6, § 58, subds. c, 3f. Regarding bishops and religious corporations see chapter 3, "Exemptions," § 35.

<sup>105</sup> *People v. Commissioners of Taxes & Assessments*, 142 N. Y. 348, 37 N. E. 116; *Roman Catholic Church of the Transfiguration v. Niles* (Sup.) 33 N. Y. Supp. 243, 86 Hun, 221, construing the retroactive clause of Laws 1892, c. 169.

<sup>106</sup> *In re Short's Estate* (1851) 16 Pa. St. 63; *Carpenter v. Pennsylvania*, 17 How. 456; *Com. v. Smith*, 5 Pa. St. 143. See, also, *In re Alexander's Estate*, 3 Pa. Law J. Rep. 87; *In re Ewing*, 1 Crompt. & J. 151; *Orcutt's Appeal*, 97 Pa. St. 184. But see *Pullen v. Commissioners* (1872) 66 N. C. 361.

<sup>107</sup> *Supra*.

that we ought not to give the act a retroactive effect unless we are forced to do so by the stringency of the words. The principle is a sound one where retroaction would work an injustice, \* \* \* but certainly no injustice is done by increasing a tax to meet an increase of the public burden."

Short's Estate subsequently came before the supreme court of the United States.<sup>108</sup> It appeared that decedent was a citizen of the state, had died in 1849, and his resident executor claimed that certain bonds, not within the state, and legacies to foreigners, were not taxable, and that the act of 1850 was retroactive, upon the ground that the rights of the legatees vested at decedent's death. It was also urged that the law was *ex post facto*. The latter contention the court overruled, with the observation that it only applied to criminal cases. In passing upon the other objection the court said:<sup>109</sup> "Until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of domicile as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. \* \* \* The rights of the donee are subordinate to the conditions, formalities, and administrative control prescribed by the state in the interest of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it."<sup>110</sup> Thus, there is nothing to prevent the state from taxing estates undistributed, even if the act is passed

<sup>108</sup> Sub nom. *Carpenter v. Pennsylvania* (1854) 17 How. 456.

<sup>109</sup> Page 462.

<sup>110</sup> Citing *Ennis v. Smith*, 14 How. 400; *In re Ewing*, 1 Crompt. & J.

subsequently to date of death. This is the English rule.<sup>111</sup>

In a recent case in Pennsylvania, however, the court seemed inclined to doubt whether, if the collateral act of 1887 (consolidating the law of that state) assumed to tax any other or different estates than those provided for in previous statutes, it would be constitutional; but the objection seems only to have referred to a requirement of the constitution that the title of the act should clearly indicate the subject-matter of the bill.<sup>112</sup>

The claim of the state for taxes is not suspended until the estate of a deceased person is administered, or bound to share with that of creditors in the distribution of the proceeds. The state may enforce it to the exclusion of all other creditors.<sup>113</sup>

## § 25. Not a Tax upon Exports or Commerce.

These statutes have also been before the federal supreme court, upon the claim that a statute of Louisiana taxing foreign legatees violated the rights of aliens under treaty between the federal government and foreign powers, and conflicted with the constitution, but it was held that the power of the state to impose such a tax upon foreign legatees was similar to that which the state exercised in taxing its own citizens; that the state, in allowing aliens to inherit, conferred a privilege which it could tax, or withdraw totally; and that aliens were not entitled to exemption, un-

151; *Attorney General v. Napier*, 6 Exch. 217; *Lawrence v. Kitteridge*, 21 Conn. 577; 1 Barb. Ch. 180.

<sup>111</sup> See cases *supra*, and *Attorney General v. Middleton*, 3 Hurl. & N. 125; *Cooley, Tax'n* (2d Ed.) 376; chapter 1, § 4, note 29.

<sup>112</sup> *Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 441, 17 Atl. 1094, affirming 5 Pa. Co. Ct. R. 271; *Bittinger's Estate* (Appeal of Commonwealth; 1889) 129 Pa. St. 338, 18 Atl. 132. See section 9, *supra*.

<sup>113</sup> *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Hil. Tax'n*, § 66.

der the constitution,<sup>114</sup> as being a tax upon commerce or exports.<sup>115</sup>

## § 26. Conflicting with Treaties and Alien Rights.

The Louisiana statute also came before the supreme court in 1856,<sup>116</sup> when it was contended that it conflicted with the treaty of France made in 1853,<sup>117</sup> which stipulated against the imposition of inheritance taxes; but, as the decedent died in 1848, the court held that the treaty could not divest rights accruing before it went into effect, and it was doubted, under the express terms of the treaty whether the federal government could control the succession laws of the state, in the absence of an act of the state repealing the law, and accepting the provisions of the treaty.<sup>118</sup>

But it has since been held by the supreme court that, where the state law conflicts with a treaty between the federal government and a foreign power, such law becomes pro tanto inoperative, as against citizens of such foreign power, and the treaty being the supreme law of the land, and retroactive as well as prospective, the fact that the law existed before the treaty went into effect would make no difference.<sup>119</sup>

The treaty of 1853 between France and the United States does not exempt French citizens from the inheritance tax,

<sup>114</sup> Sections 8-10 of article 1.

<sup>115</sup> *Mager v. Grima* (1849) 8 How. 490, affirming 12 Rob. (La.) 584. See *Arnaud's Heirs v. His Executor*, 3 La. 337; *Quessart's Heirs v. Canonge*, *Id.* 560, and *Dallinger v. Rapello*, 14 Fed. 33.

<sup>116</sup> *Prevost v. Greneaux*, 19 How. 1, affirming 12 La. Ann. 577.

<sup>117</sup> See *In re Bondon*, N. Y. Law J. March 1, 1892.

<sup>118</sup> See, also, *Frederickson v. Louisiana* (1859) 23 How. 445; *Succession of Schaffer*, 13 La. Ann. 113.

<sup>119</sup> *Succession of Dufour*, 10 La. Ann. 391; *Succession of Amat*, 18 La. Ann. 403. *Succession of Crusius*, 19 La. Ann. 369; *Hauenstein v. Lynham*, 100 U. S. 483; *Cooley, Tax'n* (2d Ed.) 100.

as imposed under the laws of New York.<sup>120</sup> The treaty provides that: "In all states of the Union whose existing laws permit it, so long as, and to the same extent as, the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously, or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subject to taxes on transfer, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed."

### § 27. Government Bonds and State Securities.

Perhaps one of the best illustrations of the exact nature of this tax, as being one that is imposed upon the privilege of succeeding to property, and not upon the property per se, which is merely used as a medium for ascertaining the value so as to fix the amount of the tax,<sup>121</sup> is that of government bonds and state stocks, or securities declared by general laws to be exempt from all taxation. These securities have been, nevertheless, subjected to the collateral inheritance tax.<sup>122</sup>

<sup>120</sup> *In re Bondon*, N. Y. Law J. March 1, 1892.

<sup>121</sup> *Wallace v. Myers*, 38 Fed. 184. *In re Swift*, 137 N. Y. 77, 32 N. E. 1096. "In view of the federal decisions fixing the status of this form of taxation, it seems absurd to regard succession charges as property taxes. \* \* \* It is upon the idea that the tax is the price paid for the privilege of succession that its constitutionality has been upheld when applied to the transmission of United States securities." 32 Am. Law Reg. (N. S.) 366.

<sup>122</sup> *In re Carver's Estate* (1893) 4 Misc. Rep. 592, 25 N. Y. Supp. 991; *In re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989. The statute of West Virginia (Laws 1887, p. 111, c. 31) expressly taxes all public securities for money of every

One of the earliest cases upon this subject is that of *Strode v. Com.*,<sup>123</sup> where the state sought to collect a collateral tax upon an estate, a part of which was composed of government bonds devised to collaterals; and the right of the state to collect the tax upon the value of these bonds was upheld upon the familiar grounds stated above, and within the ruling of the federal courts.<sup>124</sup> Chapman, P. J., said:<sup>125</sup> "But the view entertained by the court is that no act of congress impinges upon the collateral inheritance law. This law contemplates the imposition of no tax such as congress intended to prohibit. It is called a 'tax' or 'duty,' but has little or no analogy to a tax, in the usual acceptance of the term. It cannot be regarded as a penalty, exactly,<sup>126</sup> but it approximates that as nearly as it does an ordinary tax." Woodward, C. J.,<sup>127</sup> in giving the opinion of the supreme court, said: "Neither the prohibitory clause of the act of congress of 1862, nor any of the principles of decision against state authority to tax that which federal authority has exempted from taxation, have any

kind. Also that of Maryland, Appendix, VIII. The United States supreme court has frequently held that a state statute imposing a tax upon bank capital invested in United States bonds is unconstitutional, but it seems these were cases of a property tax purely, and have no application to a tax of this character. *People v. Tax Com'rs of City and County of New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Banks of New York v. Mayor*, 7 Wall. 16.

<sup>123</sup> 52 Pa. St. 181; *Clymer v. Com.*, Id. 189. See, also, *In re Howard*, 5 Dem. Sur. 483; *Wallace v. Myers*, supra; *In re Van Kleeck*, sub nom. *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50. They have also been held taxable under the New York act of 1892, c. 399. *In re Carver's Estate*, supra; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989.

<sup>124</sup> Citing *McCulloch v. Maryland*, 4 Wheat. 316.

<sup>125</sup> Page 186.

<sup>126</sup> It is not a penalty or forfeiture. *Arnaud's Heirs v. His Executor*, 3 La. 337; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>127</sup> 52 Pa. St. 189, supra.

application here. The federal government has not prohibited the state from prescribing rules of inheritance and succession to estates of decedents, and it would be a grievous mistake of legislative and judicial authority to apply it with such effect.<sup>128</sup>

Upon the same principle, the tax was held rightfully imposed upon a collateral who was a devisee of certificates issued by the state of Pennsylvania for a state loan, which were declared by the law under which they were issued to be exempt from state, municipal, or local taxation;<sup>129</sup> and in a recent case in New York the law of that state was upheld by the United States circuit court, where the state sought to assess taxes upon government bonds passing to collaterals under a decedent's will.<sup>130</sup>

In the Wallace Case, *supra*, it was contended that the fact that the tax was assessed upon the value of the bonds showed that it was a property tax, and that it was therefore void.<sup>131</sup> The circuit court said: "The circumstance that incidentally, under such a statute, such bonds may have to be valued, in order to ascertain the amount of the tax, does not affect its essential nature, as one upon the privilege, and not upon the bonds. \* \* \* Such a tax is no more upon the bonds than an income tax is one upon the property out of which the income is derived, or an excise tax is one upon the articles manufactured or sold. The bonds are the subject of the appraisal, but the privilege is the subject of the tax."<sup>132</sup>

<sup>128</sup> See, also, *In re Tuigg's Estate*, *supra*.

<sup>129</sup> *Com. v. Herman* (1885) 16 Wkly. Notes Cas. 210.

<sup>130</sup> *Wallace v. Myers* (1889) 38 Fed. 184, citing *Mager v. Grima*, 8 How. 490; *Carpenter v. Pennsylvania*, 17 How. 456. See *In re Howard*, 5 Dem. Sur. 483; *In re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548; *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50.

<sup>131</sup> See *Pullen v. Com'rs* (1872) 66 N. C. 363, where a like objection was overruled.

<sup>132</sup> Citing *Society for Savings v. Coite*, 6 Wall. 594; *Hamilton Co.*

**§ 28. United States and Municipalities—Legacies to—Taxable.**

So, under the New York statutes, it is held that, the tax being upon the privilege of succession, the state has power to tax a legacy to the United States government with the same force that it taxes a legacy to a natural person, and that it is not a taxation of the property of the federal government. Bartlett, J., said: "This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession to property. This view eliminates from the case the point urged by the appellant, that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet, in contemplation of law, the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid."<sup>133</sup> "In the view we take of this case, the legacy to the United States is subject to this tax, whether we consider the assessment

*v. Massachusetts*, Id. 632; *People v. Home Ins. Co.*, 92 N. Y. 328, affirmed 119 U. S. 129, 8 Sup. Ct. 1385; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096. See, also, *People v. Home Ins. Co.*, 92 N. Y. 345, affirmed 134 U. S. 594, 10 Sup. Ct. 593; *People v. Wemple* (N. Y. App.) 33 N. E. 720. These cases hold that the fact that a corporation paying a franchise tax has invested some of its deposits in federal securities, exempted from taxation, does not exempt the society from the franchise tax as to the amount so invested.

<sup>133</sup> *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505; Id. (Sup.) 26 N. Y. Supp. 191; *In re Cullum's Estate* (1893) 5 Misc. Rep. 173, 25 N. Y. Supp. 700; Id., 76 Hun, 610, 27 N. Y. Supp. 1105, affirmed in court of appeals, 145 N. Y. 593, 40 N. E. 163, mem.



as made under the language of the law of 1892, or of the various statutes it amends and repeals. Whether the transfer is 'to persons or corporations,' in the language of the law of 1892, or 'to any person or persons, or to a body politic or corporate,' in the words of the earlier statutes, we are of the opinion the language includes the government of the United States. For the purpose of receiving legacies, and for many other purposes, the United States is to be regarded as a body politic and corporate."<sup>134</sup> So, under these decisions, it has been recently held that a legacy to the mayor, aldermen, and commonalty of the city of New York, for the purpose of erecting an ornamental fountain, is liable to taxation under the express language of the act of 1891,\* Surrogate Fitzgerald holding as follows:† "It is not questioned that the legatee is a 'body politic or corporate.' It is, therefore, taxable by the express verbiage of the law, unless it can be shown to be one of the 'societies, corporations, or institutions now exempted by law from taxation.' There is no provision of the constitution prohibiting the legislature from imposing a tax upon this municipality, and, so far as I have been able to learn, there is no statute which exempts it from general taxation. The privilege conferred ‡ must be obviously limited to corporations organized under the act of which it is an amendment, and cannot, by the most liberal construction, be deemed to have been intended to extend the exemption to municipal corporations. I had occasion, in *Re Cullum's Estate*,\*\* to refer to the advantage, in construing the various acts taxing inheritances, of regarding them as limitations upon the power of testamentary dis-

<sup>134</sup> In *re Merriam's Estate* (1894) 141 N. Y. 479, 36 N. E. 505, citing *U. S. v. Maurice*, 2 Brock. 96, 109, Fed. Cas. No. 15,747.

\* Laws 1891, c. 215.

† In *re Hamilton's Estate*, 13 N. Y. Law J. 1384.

‡ Laws 1891, c. 215; Appendix, I.

\*\* 5 Misc. Rep. 173, 25 N. Y. Supp. 700.

position; and my views then expressed have since received the approval of the court of appeals.†† \* \* \* I fully concur in the views expressed in the able brief of the counsel to the corporation as to the impropriety of taxing bequests of this character, but relief must be sought from the law-making power."

### § 29. Legatee's or Owner's Domicile as to Personal Property and Its Situs.

Under this, one of the most important branches of the collateral tax law, questions that are beset with difficulty constantly arise. As the majority of these questions do not, however, strictly involve constitutional or jurisdictional points, their discussion and treatment, with one or two exceptions, has been deemed more appropriate under the general topic of "Domicile and Situs," discussed in another chapter;<sup>135</sup> and it remains here merely to consider the propositions of law which have been determined with respect to such questions of domicile and situs arising under the various constitutional provisions, federal and state.

These adjudications seem to have resolved themselves into several propositions:

(1) Under the maxim "*Mobilia sequuntur personam*,"<sup>136</sup> it seems to be generally conceded that the state of the decedent's domicile has the power of imposing a succession, legacy, or inheritance tax upon the personal property of such decedent, whether situate there, or in a foreign country (and perhaps upon the real estate in a foreign state), and whether bequeathed to resident or alien legatees.<sup>137</sup>

†† Citing *In re Merriam's Estate*, supra.

<sup>135</sup> See chapter 4, § 47.

<sup>136</sup> Upon this maxim, see 5 *Political Science Quarterly* (Dec., 1890) 646; note to *Commonwealth's Appeal (Small's Estate)* 32 *Am. Law Reg.* 365, 151 *Pa. St.* 1, and 25 *Atl.* 23.

<sup>137</sup> Chapter 4, § 47; *Tyson v. State*, 28 *Md.* 577; *Mager v. Grima*, 8

And a state can rightfully tax as the property of a resident the registered public debt of another state, although the debtor state may have exempted it from taxation, or actually taxed it.<sup>138</sup>

There can be no doubt that the legislature has the power to impose the tax, not only where it affects citizens of the state, but also where nonresidents or aliens claim by inheritance or by will property located there. Every state in the Union, in the absence of a constitutional prohibition, has the authority to regulate by law the devolution and distribution of an intestate's property situated within the jurisdiction of that state, and personal property situated elsewhere, but owned by a resident, and to prescribe who shall take, and who shall not be capable of taking it.<sup>139</sup>

(2) It has been held, under the law of Maryland, that tangible personal property, i. e. bonds and securities, that are situate in the taxing state, are liable to the succession and legacy tax, although the decedent was not domiciled there, but died in another state, of which he was a citizen and where his will was probated, and in which his collateral legatees resided, and left neither debts nor collateral legatees in such taxing state.<sup>140</sup>

The same power exists in parliament, but the intention

How. 490; *Eyre v. Jacob*, 14 Grat. 422; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Short's Estate*, 16 Pa. St. 63; *Com. v. Smith*, 5 Pa. St. 143; *In re Alexander's Estate*, 3 Pa. Law J. 87; *U. S. v. Hunnewell*, 13 Fed. 617; *In re Ewing's Estate*, 1 Crompt. & J. 151-158; *Bittinger's Estate (Appeal of Commonwealth)* 129 Pa. St. 338, 18 Atl. 132; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

<sup>138</sup> *Bonaparte v. Tax Court*, 104 U. S. 595.

<sup>139</sup> *State v. Dalrymple*, and cases, *supra*. See, also, *Commonwealth's Appeal (Small's Estate)* 151 Pa. St. 1, 25 Atl. 23, and note to same case, 32 Am. Law Reg. 365.

<sup>140</sup> *State v. Dalrymple*, *supra*. Such would also now seem to be the law of New York as to both foreign testates and intestates, where there is property within the state. *In re Will of Enston*, 113

to tax the personal property of such nonresidents must be clearly expressed.<sup>141</sup>

Under this doctrine they are exempted under the legacy act, and, to some extent, taxed under the succession act.

Where a nonresident is owner of tangible property within the state, and the state imposes a tax upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no ju-

N. Y. 183, 21 N. E. 87; *In re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517; *In re Clark's Estate* (Surr.) 9 N. Y. Supp. 444; *In re Romaine*, 127 N. Y. 80, 27 N. E. 759. This case has attracted general attention. See 58 Hun, 109, 11 N. Y. Supp. 313; 43 Alb. Law J. 513; 48 Leg. Int. (Phila.) 265. With regard to the liability of nonresident decedents to pay tax upon personal property, i. e., stocks and bonds of foreign corporations, in New York, the ruling in *Re Romaine*, *supra*, has been modified and distinguished, under the act of 1887 (chapter 713), by a recent decision in the court of appeals in *Re James*, 144 N. Y. 6, 38 N. E. 961, holding that such stocks were not property in a legal sense within the state, and that the legal situs of that species of personal property is where the corporation exists, or where the shareholder has his domicile. Gray, J., said, "The reading of the act does not authorize us to construe it as an effort to tax that over which there was no jurisdiction, and it would be highly improper to impute to the legislature such an intention." The question as to whether such property is taxable under the act of 1892, c. 399, has not been determined. The language of this act is more comprehensive in its scope, and would seem to overcome the objection taken in *Re James*, *supra*. See Laws 1892, c. 399, § 22. The court adopted the rule of general tax laws prevailing in New York on this subject, but as we have shown elsewhere (chapter 4, § 47, subd. b) this rule of domicile is a mere fiction of law,—has no application to a tax like the inheritance tax. See *In re James*, *supra*; *In re Phipps*, 143 N. Y. 641, 37 N. E. 823, affirming 77 Hun, 325, 28 N. Y. Supp. 330. Yet, in *Re Swift*, 137 N. Y. 77, 32 N. E. 1096, the same court held that the question of taxation is one of fact, and cannot turn on theories or fictions.

<sup>141</sup> Per Cranworth, Lord Chancellor; *Wallace v. Attorney General*, 1 Ch. App. 1. See chapter 4, § 47, subd. a.

risdiction to assess such a tax against the owner personally.<sup>142</sup>

(3) That as to real estate situate beyond the jurisdiction of the state, where the owner was domiciled at the time of his death, it is beyond the constitutional power of such state to tax the same by any direct tax.<sup>143</sup>

Accordingly, it has been held that the statute of Pennsylvania, passed in 1887,<sup>144</sup> which attempted to impose a tax, and to make it a lien upon real estate situate in the state of Maryland, was, so far as the real estate was concerned, a direct tax thereon, and beyond the jurisdiction of the state, and the statute was held, *pro tanto*, unconstitutional.<sup>145</sup> The court conceded, however, that the state might impose a succession tax upon such foreign real estate, where it belonged to a citizen, but not a direct tax.

(4) But in Pennsylvania, where real estate belonging to the citizen of the taxing state, and situate in a foreign country or state, and thus beyond the jurisdiction of the owner's domicile, be directed by will to be converted into personalty, the tax may be imposed, as there is then an equitable conversion, and the tax is in reality only imposed upon the proceeds of the real estate.<sup>146</sup>

<sup>142</sup> Cooley, *Tax'n* (2d Ed.) 21, citing *People v. Supervisors of Chango Co.*, 11 N. Y. 563. See *Hilton v. Fonda*, 86 N. Y. 339.

<sup>143</sup> *Appeal of Commonwealth (Bittinger's Estate)* *supra*, distinguishing *Com. v. Smith*, 5 Pa. St. 142. See, also, *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834, and cases cited *supra* (section 15).

<sup>144</sup> Laws Pa. 1887, p. 79, Appendix, III.

<sup>145</sup> *Appeal of Commonwealth (Bittinger's Estate)* *supra*.

<sup>146</sup> *Miller v. Com.* (1886) 111 Pa. St. 321, 2 Atl. 492; *In re Williamson's Estate* (1893) 153 Pa. St. 508, 26 Atl. 246, Mitchell, J., dissenting; *In re Hale's Estate*, 161 Pa. St. 181, 28 Atl. 1071; *In re Howard*, 5 Dem. Sur. 483, and cases cited chapter 4, where the subject of equitable conversion is considered. See, also, *supra*, section 15. *Contra*, *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

### § 30. Exemptions—When Constitutional.

In the absence of constitutional prohibitions, reasonable and fair exemptions under these statutes may be and are made, both as to persons in the direct or collateral line, and as to the value of the property passing, sought to be taxed.

The provision of the federal constitution,<sup>147</sup> that no state shall deny to any person within its jurisdiction the equal protection of its laws,<sup>148</sup> was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.

It may, if it choose, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon different products. It may tax real and personal estate in a different manner. It may tax visible property only, and not tax securities for payment of money. It may allow deductions for indebtedness, or not allow them.<sup>149</sup>

So it has been held in New York that the legislature is not controlled as to the extent of taxation of property within the state, and, in imposing a special tax upon all persons within a certain class, there is no violation of fundamental

<sup>147</sup> 14th amendment.

<sup>148</sup> Yet, in *State v. Ferris* (April, 1895) 9 Ohio Cir. Ct. R. 298, 300, affirmed as *State ex rel. v. Ferris*, 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352 (opinion will be published in N. E. Rep. as soon as handed down), the circuit court of Ohio declared the direct inheritance tax of that state invalid, as violating the clause of the 14th amendment to the United States constitution, providing that no state "shall deny to any person within its jurisdiction the equal protection of the law." The cases in the United States supreme court referred to in the text show that this provision has no relation to these laws. *Supra*, section 12.

<sup>149</sup> *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 10 Sup. Ct. 533; *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464.

principles. Where the tax is made to apply to every estate which is devised or bequeathed to, or inherited by, the persons specified in the law, it is equal, and therefore free from objections on legal grounds.<sup>150</sup>

So an excise upon the transmitting of property by will or descent is not unequal, and so unreasonable, by reason either of an exemption of kindred in the direct line, or of a higher rate as to collaterals and strangers. It is not so clearly unreasonable, by reason of an exemption of estates under \$10,000, as to render it unconstitutional.<sup>151</sup>

And in a recent case in Maine, under the inheritance tax law of that state,<sup>152</sup> the court held that: "It is entirely within the province of the legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally or as joint tenants, per capita or per stirpes. In the absence of constitutional prohibition, the legislature is supreme, and may dispose of an intestate's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals. If it permits, as our laws now do, collateral kindred to inherit, no reason is perceived why the state is debarred from exacting an excise or duty from such collateral for such privilege allowed by the state. It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent." Statutes have been passed, however, creating exemptions, which have been declared void, as violating constitutional provisions.

<sup>150</sup> *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464.

<sup>151</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512.

<sup>152</sup> *State v. Hamlin* (1894) 86 Me. 502, 30 Atl. 76.

In *Curry v. Spencer*,<sup>153</sup> an inheritance tax law was held unconstitutional, as violating the provision limiting the power to tax "proportional and reasonable assessments, rates and taxes upon all the inhabitants and residents within the said state, and upon the estates within the same," and as violating the bill of rights, requiring every inhabitant to contribute not more of his proportional share of the common burden. The court said: "We therefore go no further than to say that, if the legislature deems it expedient to defray the expenses of probate courts by a tax upon recipients of estates therein adjudicated, such tax must be proportional, and constitute only the just share of those upon whom it is imposed; that it cannot lawfully make discriminations, and cast the burden upon one class of beneficiaries, and exempt all other classes from its operation; and that it cannot, therefore, for purposes of taxation, exempt legacies and successions to husband, wife, children, and grandchildren, and include only those by the collaterals and others than those specified." In Ohio the direct inheritance tax act<sup>154</sup> has recently been declared unconstitutional, as violating the rule of uniformity and equality, in that the exemptions under the act were restricted to certain classes and amounts, and did not apply to all persons.<sup>155</sup>

And in Minnesota,<sup>156</sup> a statute requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums, arbitrarily prescribed with reference to the value of the estate, was held unconstitutional, being contrary to clauses requiring equality of taxation, and the dispensation of jus-

<sup>153</sup> 1882, 61 N. H. 624.

<sup>154</sup> Appendix, Act 1894 (91 Ohio Laws, 166).

<sup>155</sup> *State v. Ferris* (April, 1895) *supra*, p. 68.

<sup>156</sup> *State v. Gorman* (1889) 40 Minn. 232, 41 N. W. 948. The constitution of this state now allows such a tax. See section 11, *supra*.



tice freely and without purchase. The court said:<sup>157</sup> "It is thus apparent that these exactions are taxes, in the general and in the precise meaning of that word, and, if the constitutional rule of approximate equality has been disregarded, the law cannot stand. It seems hardly necessary to refer particularly to the schedule of values and of amounts required to be paid, to show that the law wholly fails, in apportioning the burden imposed, to regard the constitutional rule of equality, measured with reference to the value of the property taxed. In the first place, estates not exceeding \$2,000 in value are wholly exempt from any contribution. If estates are taxable in this manner at all, such an exemption is contrary to the requirements of the constitution."

This ruling is now probably overcome by the recent amendment to the constitution of that state, providing for an inheritance tax.<sup>158</sup>

Under the constitution of Pennsylvania to exempt an institution from taxation it is an essential feature that it be a public charity, free from any element of private or corporate gain. When it is free from the latter element, and is an institution devoted to charity by its act of incorporation, its character as such charity is not destroyed, if to some extent it receive a revenue from the recipients of its bounty.<sup>159</sup>

### § 31. General Questions as to Jurisdiction.

Surrogates' courts are constitutionally empowered to determine the tax, as it is simply an incident in the settlement of the estate of deceased persons.<sup>160</sup> And the power to im-

<sup>157</sup> 40 Minn. 235, 41 N. W. 949.

<sup>158</sup> *Supra*, section 11.

<sup>159</sup> *Philadelphia v. Woman's Christian Ass'n* (1889) 125 Pa. St. 572, 17 Atl. 475; *Philadelphia v. Pennsylvania Hospital*, 47 Leg. Int. 70.

<sup>160</sup> *In re McPherson* (1887) 104 N. Y. 306, 10 N. E. 685; *Wallace v. Myers*, 38 Fed. 184.

pose a succession tax may be delegated by the legislature to counties and municipal corporations, though it should be plainly and unmistakably conferred, and the law will be strictly construed.<sup>161</sup>

<sup>161</sup> *Peters v. City of Lynchburg*, 76 Va. 927; *Schoolfield v. City of Lynchburg*, 78 Va. 366. Constitutional rule considered with reference to valuation of life estates. See *William's Case*, 3 Bland, 186.

## CHAPTER III.

EXEMPTIONS.<sup>1</sup>

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<sup>1</sup> See, also, chapter 2, § 30, on constitutionality of exemptions; chapter 4, as to resident and nonresident decedents; chapter 6, as to constructive exemptions, remainders, trusts, powers, and legacies.

- § 40. Aliens, Foreign Legatees, and Nonresidents.
41. What Estates or Interests Taxable—Amounts Limited.
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### § 32. Taxation the General Rule.

As taxation is held to be the general rule extending to all species of property, so exemption is the exception to such rule, with the further important qualification that statutes purporting to grant exemption from general taxation are to be strictly construed against the claim.<sup>2</sup> Such exemptions are neither presumed nor allowed, unless there appears from the language of the statute or charter to be a clear intention on the part of the legislature to make an exception to the general rule;<sup>3</sup> and, where the law is doubtful, the court should declare against the exemption.<sup>4</sup>

Where, however, a particular subject is within the scope of the taxing power, and exemption from taxation is claimed on the ground that the legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance, a liberal, rather than a strict, construction should be applied; and if, by a fair and reasonable construction of its provisions, the purpose of the stat-

<sup>2</sup> Cooley, *Tax'n* (2d Ed.) 205; *Tucker v. Ferguson*, 22 Wall. 527; *People v. Long Island City*, 76 N. Y. 20; *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 587, 12 N. E. 279.

<sup>3</sup> Cooley, *Tax'n* (2d Ed.) 204, and cases cited; *People v. Roper*, 35 N. Y. 629; *People v. Davenport*, 91 N. Y. 574; *Wilson v. Gaines*, 103 U. S. 421.

<sup>4</sup> *Roosevelt Hospital v. Mayor, etc., of New York*, 84 N. Y. 108; *People v. Collison* (Sup.) 6 N. Y. Supp. 711; *Louisville & N. R. Co. v. Gaines*, 2 Flip. 621, 3 Fed. 266. And see *Fox v. Com.*, 16 Grat. 1; *In re Forrester* (1890; Sup.) 12 N. Y. Supp. 774; *In re Stiger* (1894; Surr.) 28 N. Y. Supp. 163; *In re Fayerweather* (1894) 143 N. Y. 119, 38 N. E. 278.

ute can be carried out, that interpretation ought to be given to effectuate the legislative intent.<sup>5</sup>

Special tax laws, however, are to be construed most strictly against the government, and most favorably to the taxpayer;<sup>6</sup> and a citizen cannot be subjected to such special burdens without clear warrant of law.<sup>7</sup>

### § 33. Policy of Inheritance, Legacy, and Succession Tax Laws.

As has already been observed in the first chapter, it has been the policy of these laws from the earliest times to make exemptions. Those that were allowed, however, were strictly confined, for the most part, to gifts to the near relatives of the decedent, and to the poor. Charitable institutions do not seem, originally, to have been so generally favored. This rule has been, however, widely departed from by most of the American states which have enacted inheritance and succession laws. So, under the English legacy duty act, saving husband and wife, and, subsequently, certain well-defined charitable and religious corporations and institutions,<sup>8</sup> the law makes no exceptions, even to the nearest blood relations. As to the latter, however, in pursuance of the principle of graduation, the tax is

<sup>5</sup> *In re Enston's Will*, 113 N. Y. 174, 21 N. E. 87; *In re Stewart* (1892) 131 N. Y. 274, 282, 30 N. E. 184.

<sup>6</sup> *Dwar. St.* 742-749; *Gurr v. Scudds*, 11 Exch. 190; *U. S. v. Wigglesworth*, 2 Story, 369; *U. S. v. Watts*, 1 Bond, 580; *Fox v. Com.*, *supra*; *In re Fayerweather*, *supra*; *Partington v. Atty. Gen.*, L. R. 4 H. L. 100, 122.

<sup>7</sup> *In re Enston's Will*, 113 N. Y. 178, 21 N. E. 87, and cases cited; *In re Vassar* (1891) 127 N. Y. 12, 27 N. E. 394; *Cullen's Estate* (1891) 142 Pa. St. 18, 21 Atl. 781; *Hale's Estate* (1894) 161 Pa. St. 182, 28 Atl. 1071.

<sup>8</sup> 56 Geo. III. c. 56; 5 & 6 Vict. c. 82.

made proportionately smaller than that which is imposed upon strangers and collaterals. So the laws imposing a succession tax, passed by congress during the Rebellion, following the English statute, imposed the duty uniformly upon all who took by inheritance or intestacy. The legacy act, however, excepted husband and wife.<sup>9</sup>

But under the state laws exemptions have been generally extended so as to embrace, not only near relatives and lineal descendants, but many collateral heirs and charitable and religious corporations. And the policy seems also to be to relieve all estates or shares if under a certain fixed sum, the maximum amount exempted being from \$500 to \$10,000 in New York.

In New York and Connecticut exemptions under the collateral inheritance laws have been carried to an extreme limit,<sup>10</sup> and, it seems, beyond the true idea and scope of a collateral tax law. The statutes of these states except not only all lineal descendants born in lawful wedlock,<sup>11</sup>—which is the true limit of a collateral tax law,—but also certain collaterals and adopted children,<sup>12</sup> and in New York various societies, institutions, and corporations that are exempt by law from taxation,<sup>13</sup> and by the act of 1892 other exemptions are specified;<sup>14</sup> while in Connecticut bequests for charitable purposes and for purposes strictly public,

<sup>9</sup> Rev. St. U. S. (2d Ed. 1878) §§ 3438, 3439.

<sup>10</sup> This is especially so in the former state, as regards charitable, religious, tract, literary, and other corporations, for sweeping exemption has recently been granted them by Laws 1890, c. 553. See, also, Laws 1892, c. 399, §§ 1, 2. See Appendix, I. b.

<sup>11</sup> The New York statute of 1892 now taxes both classes.

<sup>12</sup> The only pure succession tax laws are those in force in England, and the nearest approach in this country are the laws of congress, now repealed, and those of Delaware, Maryland, Ohio, New York, and Illinois

<sup>13</sup> See Laws 1890, *supra*.

<sup>14</sup> See Appendix, I., Laws 1892, c. 399, §§ 1, 2.

within the state,<sup>15</sup> and the lineal descendants of adopted children, are also exempted. These several exemptions are, however, expressly made by the acts themselves.<sup>16</sup>

Without discussing the question whether it would not be wiser to adopt a system that would impose the burden equally upon all inheritance and successions over a certain sum,<sup>17</sup> exempting only purely charitable institutions that rely upon gratuitous donations, the object of the present chapter will be best subserved by a brief presentation and review—First, of the several statutory exemptions thus far enacted in this country, and, second, of the decisions rendered under such statutes; and this brings us to

### § 34. An Enumeration of Statutory Exemptions.

#### (a) *New York.*

##### (1) *Under General Tax Laws.*

The general laws of New York on taxation, and providing for exemptions therefrom, are contained in the New York Revised Statutes.<sup>18</sup>

The provisions deemed applicable to the exemptions under the collateral or transfer tax laws are as follows:

“Sec. 1. All lands and all personal estate within this

<sup>15</sup> Appendix, VII., Laws 1889, §§ 1–17.

<sup>16</sup> Laws N. Y. 1835, c. 483, amended by Laws 1887, c. 713, § 1; Laws 1889, c. 479; Laws 1889, c. 307; Laws 1890, c. 553; Laws 1892, c. 399, §§ 1, 2; Laws Conn. 1889, p. 106, §§ 1–17. See Appendix, I., VII.

<sup>17</sup> In New York, under Act 1892, c. 399, and Ohio, by statute passed in 1893 and 1894, both collateral and lineal heirs are now taxed. The statute of Ohio taxing lineal heirs has been declared unconstitutional, as violating the rule of the state constitution requiring equality and uniformity. *State v. Ferris*, 9 Ohio Cir. Ct. R. 299; affirmed 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352. Opinion will be published in N. E. Rep. as soon as handed down.

<sup>18</sup> Banks' 8th Ed. vol. 2, p. 1082, pt. 1, c. 13, tit. 1.

state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified. \* \* \*

"Sec. 4. The following property shall be exempt from taxation:

"(1) All property, real or personal, exempted from taxation by the constitution of this state or under the constitution of the United States.

"(2) All lands belonging to this state or to the United States.

"(3) Every building erected for the use of a college, incorporated academy, or other seminary of learning, and in actual use for either of such purposes; every building for public worship; every school-house, court-house and jail, used for either of such purposes; and the several lots whereon such buildings are situated, and the furniture belonging to each of them.<sup>19</sup>

"(4) Every poor-house, alms-house, house of industry,<sup>20</sup> and every house belonging to a company incorporated for the reformation of offenders, or to improve the moral condition of seamen,<sup>21</sup> and the real and personal property used for such purposes belonging to or connected with the same.

<sup>19</sup> See *In re Vassar*, 127 N. Y. 1, 27 N. E. 397. The New York consolidation act (Laws 1882, c. 410, § 827) makes these provisions inapplicable to any such building for public worship, and any such schoolhouse or other seminary of learning, in the city of New York, "unless the same shall be exclusively used for such purposes, and exclusively the property of a religious society." *Young Men's Christian Ass'n v. Mayor, etc., of New York*, 113 N. Y. 189, 21 N. E. 86. As to schoolhouses, see *Church of St. Monica v. Mayor, supra*. See, also, *Congregation Kal Israel Auschi Poland v. City of New York* (Sup.) 1 N. Y. Supp. 35. For institutions in New York City exempted from taxation, see Laws 1882, c. 410, §§ 824, 827.

<sup>20</sup> *Estate of Noyes*, N. Y. Law J. July 5, 1890.

<sup>21</sup> *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.



"(5) The real and personal property of every public library."<sup>22</sup>

"(6) All stocks owned by the state, or by literary or charitable institutions.

"(7) The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter."<sup>23</sup>

*(2) Collateral Heirs Under New York Acts of 1887 and 1892.*

Under the statutes in force in this state prior to the act of 1892,<sup>24</sup> the tax imposed was purely in the nature of a collateral inheritance tax, the exemptions under which are given in the note.<sup>25</sup>

<sup>22</sup> In re Lenox's Estate (Surr.) 9 N. Y. Supp. 895.

<sup>23</sup> The following is the provision referred to in the last subdivision: Section 1. "All monied or stock corporations, deriving an income or profit from the capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 2 Rev. St. (Banks' 8th Ed.) p. 1149. See, construing this section, Catlin v. Trustees of Trinity College, 113 N. Y. 133, 20 N. E. 864; In re Vanderbilt's Estate, supra, and cases post, p. 98, note 99. For a list of exemptions by special statutes, see Davis' System of Taxation (N. Y.) p. 288; also, Laws 1890, c. 553, Appendix, I. b.

<sup>24</sup> See Appendix, I., Laws 1892, c. 399. By section 23 of this act the following statutes were expressly repealed: Laws 1885, c. 483; Laws 1887, c. 713; Laws 1889, c. 307; Laws 1889, c. 479; Laws 1891, c. 215. These statutes, excepting that of 1885, have been retained in the Appendix, in order that the prior law may be readily consulted. The following statutes seem to be yet in force, and are also given in the Appendix: Laws 1890, c. 553; Laws 1892, c. 168. See, also, Laws 1893, c. 199, § 2, repealing Laws 1892, c. 443; Laws 1893, p. 1725, c. 692, § 48c; Laws 1894, p. 1929, c. 767, amending Laws 1892, c. 399, § 14. For a collection of decisions under these acts, see 3 Bliss' N. Y. Code (3d Ed.) p. 2782.

<sup>25</sup> Persons and corporations exempt under Act 1887, etc.:

(1) Father, mother, husband, wife, child, brother, sister.

(2) The wife or widow of a son, or the husband of a daughter, or

(3) Any child or children adopted as such in conformity with the

(3) *Direct or Lineal Heirs—Act 1892.*

The old statutes being repealed, the act of 1892<sup>26</sup> now taxes property passing to two classes: First, to certain

laws of the state, or any person to whom the deceased, for not less than 10 years prior to his or her death, stood in the mutually acknowledged relation of parent.

(4) And any lineal descendants of such decedent born in lawful wedlock, or

(5) The societies, corporations, and institutions now exempted by law from taxation. Laws 1887, c. 713, § 1. See Appendix, I. a. Act 1885, c. 483, only applies to property of decedents dying after June 30, 1885, when the act took effect. *In re Howe*, 112 N. Y. 100, 19 N. E. 513; *In re Thompson*, 14 N. Y. St. Rep. 487, overruling *In re Chardavoyne*, 5 Dem. Sur. 466.

(6) Legacies worth less than \$500. See *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464; *In re Underhill's Estate (Surr.)* 20 N. Y. Supp. 134.

(7) Bequests to executors in lieu of commissions. And by Laws 1889, c. 479, the persons embraced in class 3 are relieved retrospectively from the tax theretofore imposed under Act 1885, c. 483.

The amendatory act, however, only applies to such persons against whom no assessment of the tax had been made at the time it became a law,—June 14, 1889. *In re Hughes*, N. Y. Law J., July 27, 1889; *In re Kemeys*, 56 Hun, 117, 9 N. Y. Supp. 182. As to constitutionality of retrospective exemptions, see chapter 2, § 30.

<sup>26</sup> The title of the act is "An act in relation to taxable transfers of property." The word "transfer" fails appropriately to express the true nature of this tax, and it became necessary to define it in the act (section 22, c. 399): "The word 'transfer' as used in this act, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein described." See *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. The word "transfer" is not restricted to a conveyance or deed, but also includes transfers by will. *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906; reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401. See, also, *In re Brooks' Estate (Surr.)* Id. 176; *In re Forsyth*, 10 Misc. Rep. 477, 32 N. Y. Supp. 175.

collateral heirs, corporations, and strangers, at the rate of 5 per cent.;<sup>27</sup> and, second, personal property of the value of \$10,000 or more, passing to certain lineals and others at the rate of 1 per cent.<sup>28</sup>

The tax of 5 per cent. is imposed upon the transfer of any property, real or personal, of the value of \$500 or over, or of any interest therein, or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property:<sup>29</sup>

(1) When the transfer is by a resident.

(2) When the transfer is of property within the state, and decedent was a nonresident at death.

(3) Where the transfer is by a resident or nonresident, when the latter's property is within the state, by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. "Such tax shall also be imposed when any such person or corporation becomes beneficially entitled in possession or expectancy to any property, or the income thereof, by any such transfer, whether made before or after the passage of this act."<sup>30</sup> The tax on property passing to lineals is

<sup>27</sup> Laws 1892, c. 399, § 1, subd. 3.

<sup>28</sup> Laws 1892, c. 399, § 2.

<sup>29</sup> The tax is upon the estate. The limitation to \$500 in this section relates to the aggregate estate of decedent, and not to the share of the legatee. This is a change in the law as it existed prior to the act of 1892. In *re Taylor's Estate* (Surr.) 27 N. Y. Supp. 232. Legacies to strangers of \$100 are taxable where the property passing to the unexempted class amounts in the aggregate to more than \$500. In *re Flynn's Estate* (Surr.) 30 N. Y. Supp. 388; In *re Hoffman's Estate*, 143 N. Y. 333, 38 N. E. 311; In *re Hall* (Sup.) 34 N. Y. Supp. 616. Contra, In *re Sterling's Estate* (Surr.) 30 N. Y. Supp. 385; In *re Skillman's Estate* (Surr.; 1894) 32 N. Y. Supp. 780, where the surrogate refused to follow the *Hoffman Case*.

<sup>30</sup> Laws 1892, c. 399, § 1, subd. 3. The last clause of this section

further restricted by a limitation that such transfer of property shall not be taxable "unless it is personal property of the value of \$10,000 or more."<sup>31</sup>

The following classes of persons under the act of 1892 pay the tax of 1 per cent., and are thus exempt from the other tax:

- (1) Father, mother, husband, wife, child, brother, sister;
- (2) Wife or widow of a son; or the
- (3) Husband of a daughter; or
- (4) Child or children adopted as such in conformity with the laws of the state; or
- (5) Persons to whom decedent, grantor, donor, or vendor, for not less than 10 years prior to such transfer, stood in the mutually acknowledged relation of a parent; or

is retroactive, so far as the legal estate is concerned, but not as to the beneficial interest, where it came into existence after the passage of the act. *Tallmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906; see p. 80, note 26; *In re Brooks* (Surr.) 32 N. Y. Supp. 176; *In re Forsyth*, 10 Misc. Rep. 477, 32 N. Y. Supp. 175. See the subject considered in chapter 6, § 58, subd. 3, f.

<sup>31</sup> Laws 1892, c. 399, § 2. See section 22. Under this provision, in connection with the definition of the words "estate" and "property," in section 22 of the act, it has been held that the words, "unless it is personal property of the value of \$10,000, or over," apply to the aggregate property of the testator or decedent, and not to the property passing to the legatee or devisee, and that if the aggregate property passing is \$10,000, or over, it is taxable, notwithstanding the legatees take less than that amount. The court said: "And so we are prepared to say that the interest of the mother [life tenant] is taxable at one per cent., although itself of a value of less than \$10,000, because the aggregate transfers by the will to taxable persons exceeded that amount." *In re Hoffman's Estate* (1894) 143 N. Y. 333, 38 N. Y. Supp. 311, and cases cited *supra*, note 29. *Contra*, *In re Skillman*, *supra*. To this extent the rule adopted under the former statutes is modified, as the court concedes. See *In re Cager's Will*, 111 N. Y. 344, 18 N. E. 866; *In re Howe*, 112 N. Y. 100, 19 N. E. 513.

(6) Lineal descendants of decedent, born in lawful wedlock.

The exemptions under the act of 1892 are:

(1) Property, real and personal, of less value than \$500.<sup>32</sup>

(2) Personalty of less value than \$10,000, passing to lineals<sup>33</sup> and others.

(3) All real estate passing to lineals.<sup>34</sup>

(4) Persons or corporations exempt by law from taxation on real or personal property.<sup>35</sup>

(5) Any property heretofore or hereafter devised or bequeathed to any person who is a bishop,<sup>36</sup>

(6) Or to any religious corporations.<sup>37</sup>

(7) Devises, etc., to executors in lieu of commission. Excess taxable.<sup>38</sup>

(4) *Religious and Other Corporations—Act 1890.*

By the act of 1890,<sup>39</sup> the following 13 or more corporations are also exempt: "Any religious, educational, Bible,

<sup>32</sup> Laws 1892, c. 399, § 1.

<sup>33</sup> Laws 1892, c. 399, § 2; that is, where the aggregate value of the estate does not exceed \$10,000. In re Hoffman's Estate, supra.

<sup>34</sup> As to when realty is or is not taxable as personalty, under the doctrine of equitable conversion, see chapter 4, § 46, subd. b.

<sup>35</sup> Laws 1892, c. 399, § 1.

<sup>36</sup> Laws 1892, c. 399, § 2. See, also, Laws 1892, c. 169; Roman Catholic Church v. Niles, 86 Hun, 221, 33 N. Y. Supp. 243, holding that this section applies to cases where the tax had become due, but was not paid, at the time the law was enacted, and is not solely applicable to those cases where no appraisalment could be made. See, also, People v. Commissioner of Taxes & Assessments, 142 N. Y. 348, 37 N. E. 116.

<sup>37</sup> Laws 1892, c. 399, § 2.

<sup>38</sup> Laws 1892, c. 399, § 8.

<sup>39</sup> See Appendix, I. b, c. 553, approved June 7, 1890, entitled "An act to amend chapter 191 of the Laws of 1889, entitled 'An act to limit the amount of property to be held by corporations organized for other than business purposes, and relating to such corpora-

missionary, tract, literary, scientific, benevolent, or charitable corporation, or corporation organized for the enforcement of laws relating to children or animals, or for hospital, infirmary, or other than business purposes: \* \* \* provided, that this provision shall not apply to any monied or stock corporation deriving an income or profit from the [its] capital or otherwise, or to any corporation which has the right to make dividends, or to distribute profits or assets among its members.”<sup>40</sup>

(b) *Pennsylvania*.<sup>41</sup>

(1) Father, mother, wife, children, and

(2) Lineal descendant born in lawful wedlock, or

(3) Wife or widow of the son of the person dying seised or possessed.

(4) Estates of less than \$250.

(5) Bequests to executors (of a fair and reasonable sum) in lieu of commissions. Excess taxable.<sup>42</sup>

tions.” It would seem that the institution should be legally incorporated, in order to come within the statute. *Church of St. Monica v. Mayor, etc., of New York*, 119 N. Y. 91, 23 N. E. 294. This act is not retroactive. *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50, reversing *In re Van Kleeck*, 55 Hun, 472, 8 N. Y. Supp. 806. See *In re Minturn* (July 18, 1890) 3 N. Y. Law J. 804; *In re Vassar*, 127 N. Y. 10, 27 N. E. 397.

<sup>40</sup> See *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239. Columbia College, in the city of New York, is exempt, under this act. *In re Da Costa* (March 12, 1891) 4 N. Y. Law J. 1470. The United States, as a legatee, is not exempt under this act, as a foreign corporation, as it relates merely to domestic corporations. *In re Cullum's Estate*, 5 Misc. Rep. 173, 25 N. Y. Supp. 699; *Id.*, 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163; *In re Hamilton's Estate* (Sept. 9, 1895) 13 N. Y. Law J. 1384; *In re Merriam's Estate*, 141 N. Y. 479, 36 N. E. 505; *In re Prime*, 136 N. Y. 347, 32 N. E. 1091.

<sup>41</sup> Laws 1887, p. 79, § 1; Appendix, III.

<sup>42</sup> By Const. Pa. 1873, art. 9, “the general assembly may by general laws exempt from taxation public property, held for public purposes;:

(c) *Maryland*.<sup>43</sup>

- (1) The father, mother, husband, wife, children, and
- (2) Lineal descendants of the decedent.
- (3) Estates under \$500.

(d) *Virginia*.<sup>44</sup>

- (1) Lineal descendants, or
- (2) Father, mother, husband, wife, brother, sister.
- (3) Nephew or niece.

(e) *West Virginia*.<sup>45</sup>

- (1) Father, mother, wife, children, and
- (2) Lineal descendants of the grantor, deviser, or intestate.
- (3) Surviving husband.
- (4) Estates under \$1,000.

(f) *Delaware*.<sup>46</sup>

- (1) Father, mother, wife, children, and
- (2) Lineal descendants of the decedent.
- (3) Estates under \$500.

actual places of religious worship, places of burial not owned or held for private or corporate profit, and institutions of purely public charity." See *Philadelphia v. Women's Christian Ass'n* (1889) 125 Pa. St. 572, 17 Atl. 475; *Philadelphia v. Pennsylvania Hospital*, 47 Phila. Leg. Int. 70.

<sup>43</sup> 2 Pub. Gen. Laws Md. 1888, p. 1242, art. 81, § 102. See Appendix, VIII. This statute is a model of good drafting, and contains some excellent provisions, especially those relating to contingent remainders, etc.

<sup>44</sup> Acts 1866-67, p. 861, c. 64, § 3.

<sup>45</sup> Warth's Code (2d Ed.) c. 32; Laws 1887, c. 31; Code 1891, c. 32, § 51a.

<sup>46</sup> Tax 1 to 5 per cent. Rev. Code 1874, p. 38.

(g) *Connecticut*.<sup>47</sup>

- (1) Father, mother, husband.
- (2) Lineal descendants.
- (3) Adopted child.
- (4) Lineal descendants of any adopted child.
- (5) The wife or widow of a son.
- (6) The husband of the daughter of decedent, or
- (7) Bequests for some charitable purpose, or
- (8) Purposes strictly public within the state.
- (9) Estates under \$1,000.
- (10) Brothers and sisters of decedent.\*

The statute defines the words "charitable purpose" to include gifts to any educational, benevolent, ecclesiastical, or missionary corporation, association, or object.<sup>48</sup>

(h) *North Carolina*.<sup>49</sup>

- (1) Lineal descendant, or
- (2) Ancestor of the husband or wife of the deceased.
- (3) Husband or wife of such ancestor or decedent, or to which such collateral relations may become entitled to under the law for the distribution of the intestate's estate, and which real and personal property may not be required in payment of debts and other liabilities.

1. If such collateral relations be brother or sister of the father or mother of the deceased, or issue of such brother or sister, a tax of 1 per cent. is imposed.

2. If such collateral relation be a more remote relation, or the devisee or legatee be a stranger, a tax of  $2\frac{1}{2}$  per cent. is imposed.<sup>50</sup>

<sup>47</sup> Pub. Laws 1889, p. 106, c. 180. See Appendix, VII.

\* Laws 1893, c. 257, p. 406, Appendix, VII.

<sup>48</sup> Section 17.

<sup>49</sup> Bat. Revisal 1873, p. 775, § 59. Repealed by Code N. C. 1883, § 3867.

<sup>50</sup> The statutes of Louisiana and those of congress have been re-



(i) *California*.<sup>51</sup>

- (1) Father, mother, husband, and wife.
- (2) Lawful issue.
- (3) Brother, sister.
- (4) Wife or widow of a son, or
- (5) Husband of a daughter, or
- (6) Adopted child or children.
- (7) Lineal descendants born in lawful wedlock.
- (8) Societies, corporations, and institutions now exempted by law from taxation.
- (9) Estates of less sum than \$500.<sup>52</sup>
- (10) Bequests to executors or trustees in lieu of commission. Excess taxable.

(j) *Maine*.<sup>53</sup>

- (1) Father, mother, husband, wife.
- (2) Lineal descendant.
- (3) Adopted child.
- (4) Lineal descendant of adopted child.
- (5) Wife or widow of a son.
- (6) Husband of daughter.
- (7) Estates above \$500.
- (8) Bequests to executors in lieu of allowances.
- (9) Educational, charitable, or benevolent institutions in the state.†

pealed, but an inheritance tax is put in the federal income tax of 1894, which has been declared unconstitutional. See chapter 1, § 5; c. 11, § 12.

<sup>51</sup> See Appendix, IX., St. Cal. 1893, c. 168.

<sup>52</sup> St. Cal. 1893, c. 168, § 1.

<sup>53</sup> See Appendix, V., Laws Maine 1893, c. 146, § 1; Laws 1895, cc: 96, 124, amending Laws 1893. Held constitutional in *State v. Hamlin* (1894) 86 Me. 507, 30 Atl. 76. See chapter 2, § 2.

† Laws 1895, c. 96, Appendix, V.

(k) *Massachusetts*.<sup>54</sup>

- (1) Father, mother, husband, wife.
- (2) Lineal descendant.
- (3) Brother, sister.
- (4) Adopted child.
- (5) Lineal descendant of adopted child.
- (6) Wife or widow of a son.
- (7) Husband of a daughter of decedent.
- (8) Charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation.
- (9) Estates of less than \$10,000.
- (10) Executors, compensation to. Excess taxable.<sup>55</sup>

(l) *New Jersey*.<sup>56</sup>

- (1) Father, mother, husband, wife.
- (2) Children.
- (3) Brother or sister.
- (4) Lineal descendants born in lawful wedlock.
- (5) Wife or widow of a son.
- (6) Husband of a daughter.
- (7) Estates of less than \$500.
- (8) Churches, hospitals, orphan asylums, public libraries, bible and tract societies, and all religious, benevolent and charitable institutions and organizations.

(m) *Ohio*.

In Ohio there are (or at least there were) two statutes in force,—one still in force imposing a tax of 5 per cent. upon property passing to collaterals and strangers, enacted in

<sup>54</sup> See Appendix, IV., Laws 1891, c. 425, § 1. Held constitutional in *Minot v. Winthrop* (1894) 162 Mass. 116, 35 N. E. 512. See Laws 1893, c. 2, § 2.

<sup>55</sup> Laws 1891, c. 425, § 3.

<sup>56</sup> See Appendix, II., Laws N. J. 1894, c. 210, repealing Laws 1892, c. 210, § 1; Laws 1893, c. 210.

1893;<sup>57</sup> and the other, passed in 1894, and recently declared unconstitutional,‡ imposing a graduated directed inheritance tax of 1 to 5 per cent. upon property passing to lineals and others.<sup>58</sup>

(1) *Exemptions under Ohio Collateral Inheritance Act of 1893.*

- (1) Father, mother, husband, wife.
  - (2) Brother, sister.
  - (3) Niece, nephew.
  - (4) Lineal descendants.
  - (5) Adopted child, or
  - (6) Person recognized as adopted child.<sup>59</sup>
  - (7) Lineal descendant thereof.
  - (8) Lineal descendant of adopted child.
  - (9) Wife or widow of a son.
  - (10) Husband of daughter of decedent.
  - (11) \$200 from appraised value.
  - (12) Bequests to executors, etc., in lieu of commissions.
- Excess taxable.

(2) *Exemptions under Direct Inheritance Act of 1894.*

By the Ohio act of 1894,<sup>60</sup> the direct inheritance tax is imposed upon property passing to the persons enumerated above,—class 1 to 10, inclusive,—as follows:

<sup>57</sup> See Appendix, VI. a. Constitutionality of these acts discussed in Ohio Leg. News, Jan. 12, 1895, p. 183; Id. Act Jan. 27, 1893, p. 17.

‡ See chapter 2, § 18.

<sup>58</sup> See Appendix, VI. a., Laws 1894, p. 169, § 1. This act has been declared unconstitutional, as violating the provisions of the state constitution requiring equality and uniformity. See *State v. Ferris*, 9 Ohio Cir. Ct. R. 299, affirmed 23 Wkly. Law Bul. (Ohio) July 1, 1895, 349, 352. Opinion will be published in N. E. Rep. as soon as handed down.

<sup>59</sup> Under section 4182, Rev. St. Ohio.

<sup>60</sup> See Appendix, VI., declared unconstitutional in *State v. Ferris*, supra, as violating the rule of uniformity and equality, under section 2, art. 12, Const. Ohio, and article 14, § 1, Const. U. S.

When the value of the entire property of such decedent exceeds the sum of

\$ 20,000 and does not exceed \$	50,000.....	1 %
50,000 " " " "	100,000.....	1½ %
100,000 " " " "	200,000.....	2 %
200,000 " " " "	300,000.....	3 %
300,000 " " " "	500,000.....	3½ %
500,000 " " " "	1,000,000.....	4 %
1,000,000 " " " "	.....	5 %

(n) *Tennessee*.<sup>61</sup>

- (1) Father.
- (2) Mother.
- (3) Husband, or
- (4) Wife.
- (5) Children.
- (6) Brothers and sisters.
- (7) Sons-in-law.
- (8) Daughters-in-law.
- (9) Grandchildren.

(o) *Illinois*.<sup>62</sup>

There would seem to be no exemptions allowed under this statute, except—

- (1) Estates which may be valued at less than \$500.<sup>63</sup>
- (2) Estates which may be valued at a less sum than \$20,000, where the estate passes to father, mother, husband, wife, child, brother, sister, wife or widow of the son, or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the state of Illinois, or to any person to whom deceased, for not less than 10 years prior to death, stood in the acknowledged,

<sup>61</sup> Laws 1891, c. 25; Laws 1893, p. 347.

<sup>62</sup> See statute, Appendix, X., taken from Laws of Illinois for 1895, by James B. Bradwell, Chicago Leg. News, 1895, p. 213. See Laws Ill. 1895, Reg. & Ex. Sess. p. 301.

<sup>63</sup> Id. § 1.

relation of a parent, or to any lineal descendant born in lawful wedlock.

(The tax is to be levied in the above cases, only upon the excess of \$20,000 received by each person, at the rate of 1 per cent.)

(3) Estates of \$2,000 are exempt, but the excess of that amount is taxable where the property passes to or for the use of any uncle, aunt, niece, nephew, or any lineal descendant of the same, where the tax is 2 per cent. upon such excess.

(4) In all other cases the rate is as follows on each and every \$100 of the clear market value of all property, and the same rate for any less amount: On all estates of \$10,000 and less, 3 per cent.; on all estates of over \$10,000, and not exceeding \$20,000, 4 per cent.; on all estates over \$20,000, and not exceeding \$50,000, 5 per cent.; and on all estates over \$50,000, 6 per cent.<sup>64</sup>

(5) Life estates or estates for a term of years in some cases also seem to be exempt<sup>65</sup> where the property shall be bequeathed to mother, father, husband, wife, brother, and sister, the widow of the son, or a lineal descendant during the life or for a term of years, or remainder to the collateral heirs of decedent, or to stranger in blood, or to body politic or corporate at their decease, or on the expiration of such term. "The said life estate or estates for a term of years shall not be subject to any tax, and the property so passing shall be appraised immediately after the death; \* \* \* and after deducting therefrom the value of said life estate, or term of years," the tax transcribed by the act on the remainder shall be due and payable.

<sup>64</sup> Id. § 1.

<sup>65</sup> Id. § 2.

(p) *Minnesota.*

By constitutional amendment passed in 1894, provision is made for an inheritance tax,<sup>66</sup> but no law has yet been enacted.

### § 35. Charitable, Religious, and Other Corporations and Objects.

Under the general designation of charitable and religious corporations and objects have been included, as claiming exemptions under these acts, churches, cemeteries, almshouses, hospitals, dispensaries, orphan asylums, homes, houses of industry, colleges, public libraries, museums of art and history, societies to protect animals, benefit, insurance, and Christian associations, and legacies to priests for masses, and the like.<sup>67</sup>

In England, under the legacy duty act, legacies to charitable and religious corporations were at first taxable with the highest rate of duty.<sup>68</sup> Subsequently they were, to a limited extent, exempted by statute.<sup>69</sup>

In order to be exempted, it was held that the legacy for charitable purposes must be expressly so given by the will itself, and not be the subject of any secret trust.<sup>70</sup> But all such legacies seem now to be made liable to succession duty,

<sup>66</sup> See chapter 11, § 11.

<sup>67</sup> See Laws N. Y. 1890, c. 553, Appendix, I., and Laws 1892, c. 399, § 1; Laws 1892, c. 169,—by which the list of such institutions entitled to exemption is greatly extended.

<sup>68</sup> In re Griffiths, 14 Mees & W. 510; Ex parte Franklin, 3 Younge & J. 544; In re Parker, 4 Hurl. & N. 666; In re Wilkinson, 1 Crompt. M. & R. 142.

<sup>69</sup> 56 Geo. III. c. 56; 5 & 6 Vict. c. 82.

<sup>70</sup> Cullen v. Attorney General, L. R. 1 H. L. 190. But see In re Farley's Estate (Surr.) 15 N. Y. St. Rep. 727.

except in Ireland.<sup>71</sup> A bequest, absolute in form, to executors, pursuant to an understanding between them and testator, by which a valid parol trust was created in favor of certain charitable corporations which are exempt from taxation, is not subject to the legacy tax.<sup>72</sup>

And where the testator bequeathed property to his executors to be disposed of as directed in a private memorandum, which directed that a portion of the property should be delivered to exempt persons, and another portion to non-exempt persons, held, that the portion going to the latter was taxable.<sup>73</sup> Where, the legatee, a church, was proved to have no existence, and another church proved itself entitled to the legacy, it was held taxable against the latter.<sup>74</sup>

In the state of New York it has never been the general policy wholly to exempt the real or personal property of churches and colleges or charitable institutions from taxation.<sup>75</sup> Where the policy of complete exemption has been adopted, it was by means of special acts applicable to particular and specified corporations; and in that state it is said there is no general act exempting the personal property of such<sup>76</sup> colleges or churches,<sup>77</sup> and the same policy has

<sup>71</sup> 16 & 17 Vict. c. 51, § 16; 44 Vict. c. 12, § 42; *Cullen v. Attorney General*, supra.

<sup>72</sup> *In re Murphy's Estate* (1893) 25 N. Y. Supp. 106, 4 Misc. Rep. 230, citing *In re Haven's Estate* (Surr.) 2 N. Y. Supp. 639; *In re Farley's Estate*, supra.

<sup>73</sup> *In re Swift* (Surr.) 16 N. Y. Supp. 193.

<sup>74</sup> *In re Richards*, N. Y. Law J. Feb. 28, 1891.

<sup>75</sup> *Catlin v. Trustees of Trinity College*, 113 N. Y. 141, 20 N. E. 864; *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394; *In re Prime*, 136 N. Y. 356, 32 N. E. 1091.

<sup>76</sup> For general exemption statutes of New York, see page 77. supra.

<sup>77</sup> But this policy was widely departed from by Act 1892, c. 399, §§ 1, 2; *Id.* c. 169; and by the prior act of 1890 (chapter 553, Appendix, I.),—which seem to exempt the corporations therein named, not only from the collateral inheritance tax, but also from general taxation. The propriety of such wholesale exemption is questionable. The

prevailed in other states where these acts have been under construction;<sup>78</sup> but the wisdom of expressly exempting such associations or corporations as are purely charitable from the collateral tax cannot be questioned, if for no other reason than that such institutions, in various ways, and principally by aiding, educating, and sheltering the poor, sick, and destitute, both young and old, to a great extent relieve the state from the burden of supporting such persons.<sup>79</sup>

But it is essential that the basis of such exemption should clearly appear, either from the act itself imposing the collateral tax, or in some act—general or special—referred to or meant to be included in the exemption words of the statute;<sup>80</sup> for, without such express exemption, it is clear that a mere exemption of the corporation or association from general property taxation will not operate to relieve a tax imposed, not upon property, but upon the succession thereto.<sup>81</sup>

act has been held not retroactive. In *re* Minturn's Estate, 3 N. Y. Law J. 804 (July 18, 1890); *Sherrill v. Christ Church*, *supra*, reversing *In re* Van Kleeck, 55 Hun, 472, 8 N. Y. Supp. 806. See *In re* Waller, 3 N. Y. Law J. 868 (July 28, 1890). These acts do not apply to foreign corporations. *In re* Prime, 136 N. Y. 356, 32 N. E. 1091.

<sup>78</sup> *Miller v. Com.*, 27 Grat. 110; *Barringer v. Cowan*, 2 Jones, Eq. 436; *Com. v. Herman*, 16 Wkly. Notes Cas. 210-212.

<sup>79</sup> *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 588, 12 N. E. 279; *In re* Prime, 136 N. Y. 362, 32 N. E. 1091; *In re* Curtis' Estate (Surr.) 7 N. Y. Supp. 207; *Home of the Friendless v. Rouse*, 8 Wall. 436; *People v. Commissioners of Taxes and Assessments*, 36 Hun, 311; *In re* Keech, 57 Hun, 588, 11 N. Y. Supp. 265,—distinguishing *People v. Barber*, 42 Hun, 27, and 106 N. Y. 669, 13 N. E. 936.

<sup>80</sup> *Catlin v. Trustees of Trinity College*, *supra*; *In re* Prime, *supra*; *In re* Vassar, 127 N. Y. 1, 27 N. E. 398; *In re* Chittenden, N. Y. Law J. June 5, 1890; *In re* Lenox's Estate, 58 Hun, 116, 11 N. Y. Supp. 310.

<sup>81</sup> *Miller v. Com.*, 27 Grat. 110; *Barringer v. Cowan*, 2 Jones, Eq.



The statutes of New York and Connecticut both seem to meet this requirement, because by express terms the tax in New York is imposed, under the act of 1887, upon property passing to any "body politic or corporation \* \* \* other than to \* \* \* the societies, corporations, and institutions now exempted by law from taxation."<sup>82</sup>

By the act of 1892<sup>83</sup> all "persons or corporations not exempt by law from taxation on real or personal property" are taxed; and, by section 2, "any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation, is exempted."<sup>84</sup>

Some of the main difficulties under these clauses of the statutes appear to have been to ascertain precisely, from the general language used,—First, the particular societies, institutions, and corporations meant to be exempted;<sup>85</sup> whether the language is restricted to those that are merely charitable or religious in their nature, or whether, more liberally speaking, the term includes other corporations not strictly charitable, but public in nature;<sup>86</sup> and, second,

436; *Com. v. Herman*, 16 Wkly. Notes Cas. 210–212. See *In re Keith's Estate* (Surr.) 5 N. Y. Supp. 201; *In re Van Kleeck*, 55 Hun, 472, 8 N. Y. Supp. 806, reversed as *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50. See Current Comment and Legal Miscellany for March, 1891 (Pa.) p. 177.

<sup>82</sup> As to a strict construction of this clause, see *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, 20 N. E. 864, affirming 49 Hun, 278, 1 N. Y. Supp. 808; *People v. Commissioners of Taxes and Assessments*, 19 Hun, 463, 464; *In re Miller*, 5 Dem. Sur. 132, affirmed 45 Hun, 244; *In re Herr's Will*, 55 Hun, 167, 7 N. Y. Supp. 852; *In re Van Kleeck*, 55 Hun, 472, 8 N. Y. Supp. 806, reversed as *Sherrill v. Christ Church*, supra. See Appendix, I. b, Laws 1890, c. 553.

<sup>83</sup> Laws 1892, c. 399, § 1.

<sup>84</sup> See, also, Laws 1892, c. 169; *Roman Catholic Church of the Transfiguration v. Niles*, 86 Hun, 221, 33 N. Y. Supp. 243.

<sup>85</sup> This is, perhaps, obviated by chapter 553, Laws 1890, and Laws 1892, supra.

<sup>86</sup> A public library is exempt. *People v. Commissioners of Taxes*

whether the words "exempted from taxation" mean that the societies or corporations shall be exempted from all taxation whatsoever,<sup>87</sup> or whether, being charitable or religious associations within the definition of the law, and having their property exempt either by special or general statute, that is sufficient to bring them within the terms of the law.

These questions, and many others, have been only partially answered by the numerous decisions in the courts of New York. It would, perhaps, have been more satisfactory had these acts expressly stated that only such charitable, religious, and purely public corporations should be exempted from the collateral tax as were already, or should be thereafter, expressly exempted under general or special statute from taxation upon their property. This objection is perhaps obviated by the recent act of 1890, and by that of 1892. In this respect, while the statute of Connecticut is more specific in confining exemptions to gifts or devises for charitable or strictly public purposes,<sup>88</sup> it expressly extends these terms so as to include educational, benevolent, ecclesiastical, or missionary corporations, associations, or objects.

The uniform interpretation placed upon the language of the New York statute in force prior to the act of 1890 tended very much to restrict its meaning to include merely such institutions and corporations as were purely charitable or public, and exempt, as such, from a property tax, either by general statute<sup>89</sup> or by special act. If, finally, neither of

& Assessments, 11 Hun, 505; *In re Herr's Will*, 55 Hun, 167, 7 N. Y. Supp. 852; *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895. But see *In re Chittenden*, N. Y. Law J. June 5, 1890.

<sup>87</sup> This was held not necessary in *Re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>88</sup> Appendix, VII. § 17.

<sup>89</sup> 2 Rev. St. (Banks' 8th Ed.) c. 13, p. 1084.

these sources afforded any ground for exemption, the claim thereto was disallowed.<sup>90</sup>

Claims for exemption have therefore been made upon the theory—First, that the claimants were, as colleges and churches, and museums of art and history, exempt under general statutes as “incorporated companies”;<sup>91</sup> second, upon the ground that hospitals, dispensaries, asylums,<sup>92</sup> cemeteries, homes, and the like institutions were exempt under general or special statutes, as almshouses, homes for seamen, poorhouses, buildings for public worship,<sup>93</sup> public libraries, and the like;<sup>94</sup> and, third, upon various miscellaneous

<sup>90</sup> *Catlin v. Trustees of Trinity College*, 113 N. Y. 138, 20 N. E. 864. Distinguished in *Re Vassar*, 127 N. Y. 8, 27 N. E. 397.

<sup>91</sup> *Catlin v. Trustees of Trinity College*, *supra*; *People v. Coleman*, 112 N. Y. 565, 20 N. E. 389. See *Catlin v. Domestic & Foreign Missionary of P. E. Church*, 113 N. Y. 625, 20 N. E. 867; *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Kennedy*, N. Y. Law J. April 25, 1890. They are now exempt, it seems, by Laws 1890, c. 553. See Appendix, V.

<sup>92</sup> See Laws 1890, *supra*.

<sup>93</sup> See Laws 1890, *supra*.

<sup>94</sup> *Estate Ellen Thompson*, N. Y. Daily Reg. Nov. 14, 1889; *In re Keech's Estate (Surr.)* 7 N. Y. Supp. 331, affirmed as *In re Keech's Estate*, 57 Hun, 588, 11 N. Y. Supp. 265; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Kennedy*, N. Y. Law J. April 25, 1890; *In re Chittenden*, *Id.* June 5, 1890; *In re Quinn*, N. Y. Daily Reg. July 24, 1889; *In re Dewey's Estate*, N. Y. Law J. Oct. 21, 1889; *In re Curtis' Estate (Surr.)* 7 N. Y. Supp. 201; *In re Miller*, 5 Dem. Sur. 132, affirmed 45 Hun, 244; *In re Lenox (Surr.)* 9 N. Y. Supp. 895; *In re Herr's Will (Surr.)* 5 N. Y. Supp. 48, reversed 55 Hun, 167, 7 N. Y. Supp. 852; *Church Charity Foundation v. People*, 6 Dem. Sur. 154; *s. c.*, *In re Hunter*, 11 N. Y. St. Rep. 704; *In re Hochster's Estate*, N. Y. Law J. Jan. 22, 1890; *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 588, 12 N. E. 279; *In re Van Kleeck*, 55 Hun, 472, 8 N. Y. Supp. 806, reversed as *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50; *In re Minturn*, N. Y. Law J. July

grounds, as that the legacies were for masses and similar purposes.

The leading case in New York, under the first proposition, is that of *Catlin v. Trustees of Trinity College*,<sup>95</sup> where decedent had bequeathed legacies to two institutions,—one a church, and the other a college,—both of which claimed exemption upon the general ground that they were included within the term “incorporated companies,” as defined by general law.<sup>96</sup>

But in defining the general policy of the state as being against the complete exemption of colleges, churches, charitable, and religious institutions from taxation, unless exempted by general law or special charter,<sup>97</sup> it was held that the words “incorporated companies” did not include such religious, literary, or charitable institutions,<sup>98</sup> but referred to certain business corporations, and, therefore, that the claimants, not showing any general or special statutory exemption, were not within the meaning of the term “exempted by law from taxation,” under the act of 1885.<sup>99</sup>

2, 1890; *In re Noyes*, Id. July 5, 1890; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394. This case overrules, in some respects, *In re Vanderbilt's Estate*, *In re Keech*, and *In re Lenox*, *supra*.

<sup>95</sup> 113 N. Y. 137, 20 N. E. 864, affirming 49 Hun, 278, 1 N. Y. Supp. 808. See *Catlin v. Domestic & Foreign Missionary Soc. of P. E. Church*, 113 N. Y. 625, 20 N. E. 867. This doctrine has recently been reiterated by the same court in *Sherrill v. Christ Church*, *supra*.

<sup>96</sup> See *supra*, p. 79, note 23; 2 Rev. St. (Banks' 8th Ed.) p. 1084, c. 13, § 7.

<sup>97</sup> See *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Chittenden*, *supra*; *In re Lenox's Estate*, 58 Hun, 116, 11 N. Y. Supp. 310.

<sup>98</sup> Now exempt by Laws 1892, c. 399, § 2; Laws 1892, c. 169; and Laws 1890, c. 553,—Appendix, I. b, c, e.

<sup>99</sup> The words “incorporated company,” used in Rev. St. subd. 7, *supra*, p. 79, refer to certain moneyed or stock corporations not deriving any income or profit from capital or otherwise. They were applied merely to banking or loan institutions and insurance companies. 1 Rev. St. 598, § 51; 2 Potter, Corp. p. 518, § 435, and cases

This was the extent of the decision made, the court saying: "We know of no general statute exempting the personal property of religious societies or colleges from taxation."

A hospital whose real and personal property were exempt from taxation by special charter was held exempt from this tax, also as an almshouse. The same rule was applied to a college whose property was specifically exempted.<sup>100</sup>

It seems that a corporation established as an "institution of learning for the scientific, classical, and theological education of colored youth of the male sex" is not a religious corporation within the meaning of the act of 1892.<sup>101</sup>

Museums of art and history are not within the term "incorporated companies";<sup>102</sup> and it seems, whether they are so or not, if they derive an income from capital or otherwise, they are liable to taxation.<sup>103</sup>

Columbia College is exempt from the legacy tax under the act of 1890, notwithstanding, by special charter, it may own property exceeding three millions of dollars;<sup>104</sup> and the public library in the city of Brooklyn is also exempt.<sup>105</sup>

Boards of foreign missions, not exempted by general law

cited; *Catlin v. Trustees of Trinity College*, 113 N. Y. 137, 20 N. E. 864; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394. And see *Utica Cotton Manuf'g Co. v. Supervisors of Oneida*, 1 Barb. Ch. 432; *People v. Supervisors of New York*, 18 Wend. 605; *People v. Board of Sup'rs of Niagara Co.*, 4 Hill, 20, affirmed 7 Hill, 504, 518; *People v. Board of Sup'rs of New York*, 16 N. Y. 438; *People v. Cassity*, 46 N. Y. 53; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239. As to what does not constitute "income" as regards hospitals, see *People v. Purdy*, 58 Hun, 386, 12 N. Y. Supp. 307.

<sup>100</sup> *In re Vassar*, 127 N. Y. 8, 27 N. E. 396-398.

<sup>101</sup> Chapter 399, § 2; *In re Fayerweather (Surr.)* 30 N. Y. Supp. 273.

<sup>102</sup> *In re Vanderbilt's Estate*, *supra*.

<sup>103</sup> *In re Vanderbilt's Estate*, *supra*. See, also, *In re Chittenden*, N. Y. Law J. June 5, 1890; Laws 1890, c. 553; Appendix, I. b.

<sup>104</sup> Laws 1890, c. 553; *In re Da Costa*, N. Y. Law J. March 12, 1891.

<sup>105</sup> Laws N. Y. 1892, c. 441, § 9.

or special statute, are liable to tax, and especially when they are foreign corporations.<sup>106</sup>

And in North Carolina and Virginia bequests to colleges and churches have been held liable to this tax under statutes which did not exempt corporations, notwithstanding that they were otherwise expressly relieved from general taxation.<sup>107</sup>

While in Pennsylvania, under general statutes, it has been held that a college founded and maintained by donations, open to all sects and to visitation by the state, and making no profit, although taking a tuition fee, is a public charity, and as such exempt.<sup>108</sup>

This result, however, was not reached under the collateral inheritance tax; and public charities are not exempt from the statutes in that state.<sup>109</sup>

But real estate conveyed gratuitously to a charitable corporation chartered to give free instruction in the natural sciences, and held and rented by it as a source of income to carry out its purpose, is neither a "gift," "bequest," nor "endowment," within the meaning of a statute exempting all gifts, bequests, or endowments belonging to it from taxation.<sup>110</sup>

<sup>106</sup> See *In re Prime*, 136 N. Y. 356, 32 N. E. 1091; *In re Lenox's Estate*, 58 Hun, 116, 11 N. Y. Supp. 310, 311.

<sup>107</sup> *Barringer v. Cowan*, 2 Jones, Eq. 436; *Miller v. Com.*, 27 Grat. 110; *Com. v. Herman*, 16 Wkly. Notes Cas. 210, 212.

<sup>108</sup> *Northampton College v. Lafayette College*, 46 Leg. Int. 423.

<sup>109</sup> See valuable note by John M. Gest, Esq., of Philadelphia bar, in *Current Comment and Legal Miscellany* for March 15, 1891, p. 117; *Philadelphia v. Women's Christian Ass'n* (1889) 125 Pa. St. 572, 17 Atl. 475; *Philadelphia v. Pennsylvania Hospital*, 47 Leg. Int. 70; Pennsylvania cases commented upon in *Re Vassar*, 127 N. Y. S. 27 N. E. 397, 398.

<sup>110</sup> *Wagner Institute v. City of Philadelphia*, 9 Cent. Rep. 617. And see 19 Abb. N. C. 231, for note on cases as to exemption of religious corporations from taxation.

Under the second proposition, claims for exemption have been made by various institutions upon the ground that they were almshouses, poorhouses, houses of industry, homes for seamen, cemeteries, schoolhouses, houses for public worship, public libraries, and the like, within the provisions of general or special statutes.<sup>111</sup>

While the cases upon this subject are not altogether harmonious, the question, however, as to what constitutes an "almshouse" under the general statute, has been before the court of appeals of New York; and a private institution engaged in aiding orphans, giving them clothing and education gratuitously, was defined to be an almshouse, as performing a work of pure charity, and was consequently held exempt from taxation.<sup>112</sup>

Advantage has been taken of this doctrine, and in numerous cases arising under the inheritance tax laws, where the claimant could bring itself within the principles laid down in this case, it has been held to be one of the societies, etc., "exempted by law from taxation."<sup>113</sup>

Hence all societies are exempt, as almshouses, whose object is to support, maintain, and educate orphans and half orphans without charge;<sup>114</sup> and, so long as a society and hospital wholly dependent upon voluntary contributions comes within the definition of an almshouse, it is not necessary that it should be specially exempt from taxation by spe-

<sup>111</sup> See New York Rev. St. (Banks' 8th Ed.) c. 13, § 4.

<sup>112</sup> Association for Benefit of Colored Orphans v. Mayor, etc., of New York, 104 N. Y. 588, 589, 12 N. E. 279; In re Keech, 57 Hun, 588, 11 N. Y. Supp. 265; In re Forrester, 58 Hun, 611, 12 N. Y. Supp. 774.

<sup>113</sup> For a list of societies and corporations in New York City held liable to this tax, see In re Vanderbilt's Estate (Surr.) 10 N. Y. Supp. 239. See In re Chittenden, N. Y. Law J. June 5, 1890.

<sup>114</sup> In re Quinn's Estate, N. Y. Daily Reg. July 24, 1889; In re McPherson, 5 Dem. Sur. 166-169.

cial law. Such an institution is a charitable institution.<sup>115</sup>

In this case the surrogate (Coffin, S.) defined a hospital, in its modern sense, to be a building, founded through charity, where the sick and disabled may be treated solely at their own expense, or at the sole expense of the corporation, which receives only indigent patients, and has thus all the attributes of an almshouse. In either sense he held such an institution is a charitable institution. Later cases, however, hold that, wherever there is a charge made to the patient, it is not an almshouse.<sup>116</sup>

So a corporation engaged in maintaining a house for the support of indigent and aged persons and of destitute children, and hospitals and dispensaries for the relief of the infirm, sick, and needy, which is maintained by voluntary gifts, and which has no capital stock, and conducts no business, is exempt as being in effect an almshouse, poorhouse, or schoolhouse within the general exemption statutes.<sup>117</sup>

And, where the institution dispenses its benefits without any charge whatever, it seems the fact that it has no house where the poor are lodged does not take it out of the almshouse class if it provides the means for lodging.<sup>118</sup>

<sup>115</sup> *In re Curtis' Estate* (Surr.) 7 N. Y. Supp. 207, citing *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 589, 12 N. E. 279; *People v. Commissioners of Taxes*, 36 Hun, 311; *New York Infant Asylum v. Supervisors of Westchester Co.*, 31 Hun, 116, and reviewing *Catlin v. Trustees*, 113 N. Y. 137, 20 N. E. 864, affirming 49 Hun, 278, 1 N. Y. Supp. 808. See, also, *In re Miller*, 5 Dem. Sur. 132; *In re Hochster's Estate*, N. Y. Law J. Jan. 22, 1890. Contra, *In re Herr's Will* (Surr.) 5 N. Y. Supp. 48, reversed in 55 Hun, 167, 7 N. Y. Supp. 852; *In re Neale's Estate* (1890) 57 Hun, 591, 10 N. Y. Supp. 713.

<sup>116</sup> See *In re Keech*, 57 Hun, 588, 11 N. Y. Supp. 265, and cases post, p. 108, note.

<sup>117</sup> *Church Charity Foundation v. People*, 6 Dem. Sur. 154; *In re Hunter*, 11 N. Y. St. Rep. 704.

<sup>118</sup> *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895. But this would



Where a charitable institution is originally exempt under general law as an almshouse, but subsequently a special statute is passed exempting its real estate solely, it becomes liable to the legacy tax, although as an almshouse it might have been exempt; the court adopting the rule "that where there has been a general enactment covering the subject in general, in terms which include the particular case, and there is a subsequent enactment which makes a rule for that particular, that the latter shall be held to be all that the legislature at last meant for the regulation of that case."<sup>119</sup>

On the other hand, it has been asserted that notwithstanding certain societies, such as homes, dispensaries, and hospitals, are "almshouses" within the general exemption statutes, as such exemption merely applies to the property actually occupied by them, and the personal property actually contained therein, to entitle them to exemption under the inheritance act it is still necessary that there should be a total and absolute exemption from general taxation of all property which they have or could have "under any and every possible circumstance or condition," and that, if such societies can hold any property which would be liable to taxation, then they are liable under the inheritance act.<sup>120</sup>

If it were necessary that such charitable association, in seem to conflict with the definition of an almshouse, i. e. a house appropriated to the poor,—for the use of the poor,—where they are to have a place of refuge, and to be clothed, etc. *People v. Commissioners of Taxes*, 36 Hun, 311; *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 589, 12 N. E. 279; *In re Keech*, supra.

<sup>119</sup> *In re Forrester*, 58 Hun, 611, 12 N. Y. Supp. 774, citing *Petroleum Co. v. Lacey*, 63 N. Y. 426.

<sup>120</sup> *In re Herr's Will* (Surr.) 5 N. Y. Supp. 48, reversed in 55 Hun, 167, 7 N. Y. Supp. 852. Contra, *In re Curtis' Estate* (Surr.) 7 N. Y. Supp. 207; *In re Keith's Estate* (Surr.) 5 N. Y. Supp. 201; *In re Hochster's Estate*, N. Y. Law J. Jan. 22, 1890, and cases cited supra.

order to come within the exemption clause, should show that it was exempt from all taxation whatever under every possible circumstance and condition, few corporations, even those purely charitable, would or could ever be allowed exemption under these acts. The result of such a condition of the law would be in effect to nullify the express exemption which is extended to all societies, institutions, and corporations "now exempted by law from taxation."<sup>121</sup>

Hence, it would seem that the act does not mean that such societies shall be exempt from all possible taxation. This the legislature could hardly have intended, because it is well settled that even though charitable corporations are, by general statute, relieved in most positive and general language from all taxation, this does not in every case relieve them from certain special taxes; and such the collateral inheritance tax of this state has been decided to be.<sup>122</sup>

But it would seem that the law is fully complied with when it has been satisfactorily shown that the claimant is a charitable institution, exacting no fee or reward, and purely such under either special or general law, as has been held in regard to an almshouse,<sup>123</sup> and is generally exempt from taxation.

These views have been fully sustained by the court of appeals,<sup>124</sup> where Haight, J., said: "The court below ap-

<sup>121</sup> *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>122</sup> See *In re McPherson*, 104 N. Y. 317, 10 N. E. 685; *In re Euston's Will*, 113 N. Y. 174, 21 N. E. 87; *Cooley, Tax'n* (2d Ed.) 206, 207, and cases cited, page 207, note 3; *Barringer v. Cowan*, 2 Jones, Eq. 436; *Miller v. Com.*, 27 Grat. 110.

<sup>123</sup> *Association for Benefit of Colored Orphans v. Mayor, etc.*, of New York, 104 N. Y. 589, 12 N. E. 279, and cases *supra*; *In re Herr's Will*, 55 Hun, 167, 7 N. Y. Supp. 852, reversing 5 N. Y. Supp. 48; *In re Miller*, 5 Dem. Sur. 132.

<sup>124</sup> *In re Vassar*, 127 N. Y. 10, 27 N. E. 396, reversing 58 Hun, 378, 12 N. Y. Supp. 203, and overruling *In re Keech* (Surr.) 7 N. Y. Supp.

pears to have been of the opinion that the provision of the act excepting the societies, corporations, and institutions now exempted by law from taxation referred only to those bodies which enjoy complete immunity from taxation as to all property which they now have or of which they may at any time become possessed, even in excess of the statutory limit.<sup>125</sup> Such a construction of the statute would practically nullify the provision, and render exemptions from taxation contained therein of no avail. It could subject every, or nearly every, charitable institution in the land to the payment of the tax."

A home for the aged which under its by-laws charges an admission fee is not therefore subject to collateral tax, notwithstanding it fails, by reason of such charge, to come within the almshouse class, where there is no element of profit or private gain by the corporation.<sup>126</sup>

A cemetery declared by law to be exempt from all public tax, so long as the same shall remain dedicated to the purposes of a cemetery, is exempt;<sup>127</sup> and a bequest in trust to pay to a church a certain sum towards the building of a new church, or the renovation of the present one, is exempt as a building of public worship, although the new church was built and paid for through a loan in anticipation of the payment of the legacy by the executors. If, however, the gift had been an absolute one, and not for building the new church, it seems the legacy would have been

331, and 57 Hun, 588, 11 N. Y. Supp. 265; *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>125</sup> See Appendix, I. b, Laws N. Y. 1890, c. 553.

<sup>126</sup> *In re Vassar*, supra, citing *Association for Benefit of Colored Orphans v. Mayor, etc.*, of New York, 104 N. Y. 581, 12 N. E. 279; *Philadelphia v. Women's Christian Ass'n*, 125 Pa. St. 572, 17 Atl. 475; *Northampton Co. v. Lafayette College*, 128 Pa. St. 132, 18 Atl. 516; *Seminary v. Cramer*, 98 N. Y. 121.

<sup>127</sup> *In re Dewey's Estate*, N. Y. Law J. Oct. 21, 1889

liable.<sup>128</sup> This view of the law, however, has recently been rejected by the court of appeals, and the legacy held liable to the tax,<sup>129</sup> upon the ground that it was simply a legacy of money.

So, under the English law, where money is bequeathed, whether to those who administer a charity, or who administer funds for any public purpose, ecclesiastical or otherwise, it is subject to legacy duty, inasmuch as it is considered a legacy for the benefit of strangers in blood to the testator.<sup>130</sup>

Religious corporations in New York are now expressly exempted from this tax.<sup>131</sup> This is held, however, not to exempt foreign religious corporations.<sup>132</sup> So a society for the improvement of the moral condition of seamen is exempt under general law.<sup>133</sup>

But the mere fact that a society or corporation not exempted by special charter or general law is exempted upon a portion of its property is of no avail;<sup>134</sup> and a bequest to a missionary society known as "The Paulist Fathers," which could not show special or general exemption, was held liable.<sup>135</sup>

The board of foreign missions is not exempt from this

<sup>128</sup> *In re Van Kleeck*, 55 Hun, 472, 8 N. Y. Supp. 806, citing *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, 20 N. E. 864. *Contra*, *In re Parker*, 5 Jur. (N. S.) 1058.

<sup>129</sup> *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50, reversing *In re Van Kleeck*, *supra*.

<sup>130</sup> *In re Parker*, *supra*.

<sup>131</sup> Laws 1890, c. 553; Laws 1892, c. 399, § 2; *Id.* c. 169. Appendix, I.

<sup>132</sup> See cases section 36.

<sup>133</sup> *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>134</sup> *In re Keith's Estate* (Surr.) 5 N. Y. Supp. 201; *In re Vanderbilt's Estate*, *supra*; *In re Kennedy*, 3 N. Y. Law J. (April 25, 1890); *In re Minturn's Estate*, *Id.* 804 (July 2, 1890).

<sup>135</sup> *In re Kavanagh's Estate* (Surr.) 6 N. Y. Supp. 669.

tax under the acts of 1885 or under that of 1890 (chapter 553).<sup>136</sup>

So a charitable institution,<sup>137</sup> a home for the aged, exacting an admission fee, and requiring an applicant to make a will leaving all property to it, is not an almshouse under the general law;<sup>138</sup> and an institution requiring pupils to pay, if they are able so to do, is not, it seems, a purely charitable institution, within the meaning of an almshouse,<sup>139</sup> the theory being that any charge, however small, takes the claimant out of the almshouse class. In one case this rule was carried to the extent of imposing the tax upon an institution which made a paltry charge for taking care of poor infants.<sup>140</sup>

The exemption from taxation of any building used for public worship<sup>141</sup> does not constitute a general exemption of a church from taxation, within the meaning of the exception in the collateral tax act "of corporations and institutions now exempt by law from taxation."<sup>142</sup>

Recently the court of appeals of New York has been

<sup>136</sup> *In re Prime*, 136 N. Y. 347, 32 N. E. 1091; *In re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548.

<sup>137</sup> Now exempt by Laws N. Y. 1890, c. 553. Appendix, I. b.

<sup>138</sup> *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895; *In re Keech's Estate* (Surr.) 7 N. Y. Supp. 331, affirmed in 57 Hun, 588, 11 N. Y. Supp. 265; *In re Thompson's Estate*, N. Y. Daily Reg. Nov. 14, 1889. But see *In re Vassar* (1891) 127 N. Y. 8, 27 N. E. 394.

<sup>139</sup> *In re Hochster's Estate*, 2 N. Y. Law J. 1981 (Jan. 22, 1890). And see *Congregation Kal Israel Auschi Poland v. City of New York* (Sup.) 1 N. Y. Supp. 35; *People v. Barber*, 42 Hun, 27; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239. See, also, *In re Minturn's Estate*, supra; *In re Noyes' Estate*, 3 N. Y. Law J. 914 (July 5, 1890); *In re Keech's Estate*, supra.

<sup>140</sup> *In re Vanderbilt's Estate*, supra; *In re Lenox's Estate*, supra; *In re Chittenden*, 3 N. Y. Law J. 501 (June 5, 1890). These cases are now all overruled in *Re Vassar*, supra.

<sup>141</sup> 1 Rev. St. N. Y. p. 388, § 4, subsec. 3.

<sup>142</sup> *Sherrill v. Christ Church* (1890) 121 N. Y. 701, 25 N. E. 50, re-

called upon to determine the liability of hospitals, colleges, and homes where a charge or admission fee is made to the applicants or inmates.<sup>143</sup>

In the Vassar Case the corporation was organized to carry on a home for aged, indigent Protestant men who were unable to support themselves. The by-laws, however, provided that the applicant should pay certain admission fees, running from \$100 to \$250, and should further transfer to the home any property he should have. The lower courts held, following a line of cases based upon the Orphan Asylum Case,<sup>144</sup> that this particular institution was liable to the collateral inheritance tax. In reversing this decision, however, the court said:

"Corporations are given the power to make by-laws not inconsistent with any existing law for the management of their property, the regulation of their affairs, etc.<sup>145</sup> The home is not exempt under the provisions of any special act. If exempt it is because of its being an almshouse, within the provisions of the Revised Statutes to which we have already referred. It would be an almshouse, were it not for the fact that under its by-laws an entrance fee is charged to those seeking its benefits.<sup>146</sup>

"It is claimed that the by-laws referred to are unauthorized, and inconsistent with the provisions of the charter; that the business and object was the support of aged and indigent Protestant men who were unable to support themselves. However that may be, we are of the opinion that

versing 55 Hun, 472, 8 N. Y. Supp. 806. See *In re Forrester* (Sup.) 12 N. Y. Supp. 774.

<sup>143</sup> *In re Vassar*, 127 N. Y. 8, 27 N. E. 394, reversing (Sup.) 12 N. Y. Supp. 203.

<sup>144</sup> 104 N. Y. 581, 12 N. E. 279.

<sup>145</sup> 2 Rev. St. (7th Ed.) 1531, § 6.

<sup>146</sup> *Association for Benefit of Colored Orphans v. Mayor, etc.*, of New York, 104 N. Y. 581, 12 N. E. 279.

the charges authorized by the by-laws do not operate to deprive the home of the exemption to which it otherwise would be entitled. The home was founded, incorporated, endowed, and so far has been substantially maintained, by charity. Its object, as we have seen, is the support of the aged and indigent who are unable to support themselves. It possesses no element of private or corporate gain, and whatever income it may derive is devoted to the charity for which it is incorporated."

The court cited, to sustain these views, various cases which did not arise under collateral inheritance tax statutes, and in which it was held that a charge imposed upon applicants for membership to various charities did not deprive such charities of the character of charitable institutions, exempting them from general taxation,<sup>147</sup> and, to this extent, seems to have overruled the general rule established in the lower courts upon authority of the Orphan Asylum Case, already referred to,—that such a charge deprived the institution of its almshouse character, and thus of exemption from the collateral inheritance tax.<sup>148</sup>

There are several objections to the soundness of the rule announced in this case:

(1) It is difficult to see how any institution which makes a charge to inmates, and claims a right to take their property at death, can be characterized as a charitable institution, or at least as an almshouse, within the definition given

<sup>147</sup> See *Philadelphia v. Women's Christian Ass'n*, 125 Pa. St. 572, 17 Atl. 475; *Northampton Co. v. Lafayette College*, 128 Pa. St. 132, 18 Atl. 516. See this question considered under the Pennsylvania statute by John M. Gest, Esq., of the Philadelphia bar, in *Current Comment and Legal Miscellany* for March 15, 1891, p. 177. *Gooch v. Association*, 109 Mass. 558; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121.

<sup>148</sup> See *In re Keech's Estate* (Surr.) 7 N. Y. Supp. 331, affirmed (Sup.) 11 N. Y. Supp. 265; *In re Lenox's Estate* (Surr.) 5 N. Y. Supp. 895; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239-242.

by the court of appeals in the Orphan Asylum Case;<sup>149</sup> and Mr. Justice Haight, in citing this case, said, in speaking of the institution under consideration, "It would be an almshouse, were it not for the fact that under its by-laws an entrance fee is charged to those seeking its benefits." Yet the court practically exempted this institution on no other ground than that it was an almshouse.

(2) As the court also conceded that the "home is not exempt under the provisions of any special act," the rule laid down in this case would also seem clearly to conflict with the prior decision of *Catlin v. Trustees of Trinity College*,<sup>150</sup> for in that case the rule unanimously established was that the policy of the state was against the complete exemption of charitable institutions from taxation, unless exempt by general law or special charter.

So it has been held that where a statute<sup>151</sup> exempted from taxation that portion of the property of a hospital society "from which no income is derived," and the society had a farm used exclusively for its charter purposes, and which was not self-supporting, the products of which were almost entirely used in the hospital, except that occasionally articles were sold, and the proceeds applied to the hospital inmates on the farm, held, that such proceeds were not income under the statute, and that the exemption was not waived by the society charging patients able to pay, the money received from them being wholly applied to the support and attendance of patients who could not pay.<sup>152</sup>

Under the constitution of Pennsylvania, to exempt an in-

<sup>149</sup> *Association for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 581, 12 N. E. 279.

<sup>150</sup> 113 N. Y. 133, 138, 20 N. E. 864.

<sup>151</sup> *Laws N. Y.* 1889, c. 462.

<sup>152</sup> *People v. Purdy* (Sup.) 12 N. Y. Supp. 307, citing *Temple Grove Seminary v. Cramer*, 98 N. Y. 121; *Philadelphia v. Pennsylvania Hospital*, 47 Leg. Int. 70.



stitution from taxation it is an essential feature that it be a public charity, free from any element of private or corporate gain. When it is free from the latter element, and is an institution devoted to charity by its act of incorporation, its character as such charity is not destroyed if, to some extent, it receive a revenue from the recipients of its bounty.<sup>153</sup>

Under the statute of this state,<sup>154</sup> the tax is imposed only on "estates \* \* \* passing from any person who may die seised or possessed of such estates." It is upon the state to show, not only that the persons against whom it claims taxes are not of the exempted class, but that the estate passes from one who actually died seised or possessed of the same.<sup>155</sup>

In Pennsylvania, however, a college founded and maintained by donations, although taking a tuition fee, is a public charity, and exempt by general law, but not from inheritance tax;<sup>156</sup> and in Virginia an orphan asylum exempt under general law from taxation is liable to the inheritance tax.<sup>157</sup>

The institution known as the Young Men's Christian Association is not a seminary of learning, or house of reli-

<sup>153</sup> *Philadelphia v. Women's Christian Ass'n* (1889) 125 Pa. St. 572, 17 Atl. 475. See *Philadelphia v. Pennsylvania Hospital*, 47 Leg. Int. 70.

<sup>154</sup> Act Pa. May 6, 1887, Appendix, III.

<sup>155</sup> *In re Swann's Estate* (Pa. Sup.; 1891) 23 Atl. 599.

<sup>156</sup> *Northampton Co. v. Lafayette College*, 46 Leg. Int. 423. But see *Wagner Free Institute of Science v. City of Philadelphia* (Pa. Sup.) 11 Atl. 402, and 19 Atl. 297. That public charities are not exempt from this tax in Pennsylvania, see "Current Comment and Legal Miscellany" (Philadelphia) for March 15, 1891, p. 177, note reviewing cases, by John M. Gest, Esq.

<sup>157</sup> *Miller v. Com.*, 27 Grat. 110; *Barringer v. Cowan*, 2 Jones, Eq. 436; *Com. v. Herman*, 16 Wkly. Notes Cas. 210, 212.

gious worship, and therefore not exempt from taxation.<sup>158</sup> A schoolhouse in the city of New York is not exempt, unless it belongs to the public school system, or be exclusively the property of an incorporated religious society.<sup>159</sup> But a geographical society, the works of which are accessible at all times to the public, is a public library, within the meaning of the general law, and is exempt.<sup>160</sup> Under the English legacy acts, there is a provision exempting books, prints, statues, coins, or works of art, bequeathed to certain institutions in trust, and where not to be sold.<sup>161</sup> The phrase "public worship" refers to the usual church services upon the Sabbath, open freely to the public, and in which any one may join.<sup>162</sup> The word "person," under these acts, includes a bequest to a corporation, and it is consequently not exempt.<sup>163</sup>

(3) The following legacies to various charitable, religious, and other institutions or persons have been declared not exempt, where such institutions were not exempted by general or special law: A bequest to a church,<sup>164</sup> to keep the graves of testator's ancestors and family in order.<sup>165</sup> A

<sup>158</sup> In re Vanderbilt's Estate, *supra*.

<sup>159</sup> Church of St. Monica v. Mayor, etc., of New York, 119 N. Y. 91, 23 N. E. 294.

<sup>160</sup> People v. Commissioners of Taxes & Assessments of New York, 11 Hun, 505; In re Lenox's Estate (Surr.) 9 N. Y. Supp. 895; In re Herr, 55 Hun, 167, 7 N. Y. Supp. 852.

<sup>161</sup> 39 Geo. III., c. 73, § 1.

<sup>162</sup> Young Men's Christian Ass'n v. Mayor, etc., of New York, 113 N. Y. 187, 21 N. E. 86. See In re Van Kleeck's Estate, 55 Hun, 472, 8 N. Y. Supp. 806, reversed in 121 N. Y. 701, 25 N. E. 50.

<sup>163</sup> Miller v. Com., 27 Grat. 117.

<sup>164</sup> See Catlin v. Trustees, 113 N. Y. 133, 20 N. E. 864, affirming 49 Hun, 278, 1 N. Y. Supp. 808; In re Miller, 5 Dem. Sur. 138; In re Vassar, 127 N. Y. 8, 27 N. E. 394. But see Laws 1890, c. 553; Laws 1892, c. 399, § 2. Appendix, I.; In re Van Kleeck's Estate, *supra*.

<sup>165</sup> In re Walters' Estate, 3 Pa. Co. Ct. R. 447; In re Pirkett, 9 Ch. Div. 576; Hcare v. Osborne, L. R. 1 Eq. 585.

gift to a pastor, to say masses for the decedent.<sup>166</sup> Legacies for fencing and keeping a cemetery in good order and repair, and to a minister for preaching the gospel, are liable to inheritance tax.<sup>167</sup>

Nor is a specific bequest to executors, in trust to be used for masses for the decedent and her husband, to be said by a priest, exempt, not being made part of the funeral expenses,<sup>168</sup> but, where part of such funeral expenses is for a burial plot, it is exempt.<sup>169</sup> A legacy to be used for dressing and caring for a cemetery lot and grave of testator is not subject to tax.<sup>170</sup> But a legacy of an annuity to a church, conditioned upon the ringing of the church bell for an hour on a specified day in each year, is subject to tax.<sup>171</sup>

And the tax is payable where the bequest for masses is invalid in law, and goes to a religious corporation, which is made residuary legatee under the will.<sup>172</sup>

So a bequest to a mutual benefit assurance association, which is not exempted under general or special law, is liable.<sup>173</sup>

But money paid by a beneficiary society to a deceased

<sup>166</sup> Seibert's Appeal (Pa. Sup.) 6 Atl. 105; Rhymer's Appeal, 93 Pa. St. 142; Stewart v. Green, Ir. R. 5 Eq. 470.

<sup>167</sup> Hurst v. Cemetery Ass'n, note 170.

<sup>168</sup> In re Black's Estate (Surr.) 5 N. Y. Supp. 452. As to the validity of such bequests, see Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305; Power v. Cassidy, 79 N. Y. 602; Prichard v. Thompson, 95 N. Y. 76.

<sup>169</sup> In re Vinot's Estate (Surr.) 7 N. Y. Supp. 517.

<sup>170</sup> Hurst v. Cemetery Ass'n (1883) 1 Lanc. Law Rev. 60.

<sup>171</sup> In re Gilpin's Estate (1893) 14 Pa. Co. Ct. R. 122, 3 Pa. Dist. R. 711, 51 Leg. Int. 383.

<sup>172</sup> In re Devlin's Estate, N. Y. Daily Reg. Oct. 15, 1889.

<sup>173</sup> In re Jones' Estate (Surr.) 2 N. Y. Supp. 671. See, also, In re Hunter, 11 N. Y. St. Rep. 700; Church Charity Foundation v. People, 6 Dem. Sur. 154; Attorney General v. Abdy, 1 Hurl. & C. 266.

member's next of kin, not being any part of decedent's estate, is not within the act.<sup>174</sup>

A policy of insurance upon the life of a decedent held by him at the time of his death, payable to his executors, administrators, and assigns, or to his personal representatives, is "property," within the meaning of the collateral inheritance act,<sup>175</sup> subject to appraisal for the purpose of taxation.<sup>176</sup>

The court said: "The burden of appellant's efforts seems to be to establish that these policies were not property of which the testator was seised and possessed at the time of his death. But it must be admitted that they were obligations to pay money at a future date, and every instrument, duly executed and having a lawful consideration, which secures to the holder the payment of money at a specified date, confers upon him the right of property. The statute has declared what shall be deemed assets of the estate of a deceased person, and subject to distribution by his executors,<sup>177</sup> and includes among them all choses in action and every other species of personal property and effects. It is plain that these policies were assets of the estate. The collateral inheritance law is very broad in its provisions. All property which the decedent owned when he died, and which has an appraisable value, is to be included, subject, of course, to the payment of debts, and to such exceptions as are specifically mentioned."

But in England the amount to be received under the rules of a customs benevolent fund formed for the benefit of the widows, children, relatives, and the nominees of the officers

<sup>174</sup> *Vogel's Estate*, 1 Pa. Co. Ct. R. 352; *Folmer's Appeal*, 87 Pa. St. 133.

<sup>175</sup> Laws 1887, c. 713.

<sup>176</sup> *In re Knoedler's Estate* (1893) 140 N. Y. 377, 35 N. E. 601, affirming 68 Hun, 150, 22 N. Y. Supp. 608.

<sup>177</sup> 4 New York, Rev. St. (8th Ed.) p. 2556 § 6.

of customs has been held not to be a legacy or taxable, on the ground that the fund did not constitute part of the personal estate of the subscriber, and that it was not property that he could dispose of as he should think fit.<sup>178</sup>

### § 36. Foreign Corporations and Governments.

The words "now exempted by law from taxation," as used in the New York act of 1887, refer to exemptions under the laws of the state imposing the tax; and the fact that a foreign corporation, which is a beneficiary under the will of a resident of the taxing state, is exempt from taxation under the laws of the jurisdiction of the corporation's origin, does not withdraw it from the operation of the inheritance tax.<sup>179</sup> It seems that there is no comity which requires that corporations existing under the laws of other states should be placed under a more favorable position than domestic corporations with respect to taxation.<sup>180</sup>

Such foreign corporations are still liable in this state, notwithstanding the provisions of recent statutes.<sup>181</sup>

The general rule laid down by the courts under these statutes is that, where the local law provides for the exemption of corporations or associations from taxation, it means to include domestic only, and not foreign, corpora-

<sup>178</sup> In *re Rowsell*, Tilsley (2d Ed.) 684, referred to in *Attorney General v. Abdy*, 1 Hurl. & C. 266.

<sup>179</sup> See, also, In *re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548.

<sup>180</sup> *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, 20 N. E. 864, affirming 1 N. Y. Supp. 808; *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488; In *re McCoskey's Estate*, 1 N. Y. Supp. 782; In *re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; In *re Noyes' Estate*, N. Y. Law J. July 5, 1890; *People v. McLean*, 80 N. Y. 254; *Carpenter v. Com.*, 17 How. 462; *People v. Fire Association of Philadelphia*, 92 N. Y. 311; In *re Tuigg's Estate*, *supra*.

<sup>181</sup> Laws 1890, c. 553; Laws 1892, c. 399, § 2; Laws 1892, c. 169; Appendix, I. c; In *re Richards*, N. Y. Law J. Feb. 28, 1891.

tions. The rule is definitely settled in New York that a state statute granting powers and privileges to corporations, in the absence of plain indications to the contrary appearing on the face of the act, applies only to corporations created by the state, and not to foreign corporations. This applies to all foreign corporations, whether they be charitable, religious, or otherwise.<sup>182</sup>

The same rule is applied in Massachusetts.<sup>183</sup> The rule is stated by Andrews, J., in *Re Prime*:<sup>184</sup>

"We are of opinion that a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state, and over which it has the power of visitation and control. Such is the natural interpretation of such legislation, in the absence of a contrary intention appearing on the face of the act.

"The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the same character to the payment of such a tax, and that, if one is exempt, the other is exempt also, has, we think, no foundation. In both cases the question is the

<sup>182</sup> Code Civ. Proc. N. Y. § 3343, subd. 18; *In re Prime*, 136 N. Y. 356, 32 N. E. 1091, affirming 64 Hun, 50, 18 N. Y. Supp. 603, citing *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, 20 N. E. 864; *In re Balleis' Estate*, 144 N. Y. 134, 38 N. E. 961, 1007, affirming 78 Hun, 275, 29 N. Y. Supp. 261; *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505, affirming 73 Hun, 587, 26 N. Y. Supp. 191; *In re Cullum* (Surr.; 1893) 25 N. Y. Supp. 701, affirmed 76 Hun, 610, 27 N. Y. Supp. 1105; *In re Taylor's Estate*, 80 Hun, 589, 30 N. Y. Supp. 582; *In re Smith's Estate*, 77 Hun, 134, 28 N. Y. Supp. 476; *In re Tuigg's Estate* (Surr.) 15 N. Y. Supp. 548; *In re Fayerweather* (Surr.) 30 N. Y. Supp. 273; *In re James' Estate* (1894) 27 N. Y. Supp. 288, 28 N. Y. Supp. 351; *Id.*, 144 N. Y. 6, 38 N. E. 961; *People v. Coleman*, 135 N. Y. 231, 31 N. E. 1022; *In re Balleis* (1894) 144 N. Y. 134, 38 N. E. 1007.

<sup>183</sup> *Minot v. Winthrop* (1894) 162 Mass. 110, 38 N. E. 512.

<sup>184</sup> *Supra*.

same,—has the statute made the legacy taxable? In the Catlin Case exemption of both the domestic and foreign corporations was claimed under the Revised Statutes alone. If they did not exempt the domestic corporation, concededly they did not exempt the foreign one; and, for convenience in deciding the case, both were regarded as domestic corporations.

“It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large. The argument may have force that the state might, consistently with its proper functions, give immunity from taxation to some of the foreign corporations engaged in the work of education or charity. But, however this may be, we are convinced that the statute of 1891<sup>185</sup> has no application to foreign corporations, and, having reached that conclusion, our duty is ended.”<sup>186</sup>

In proceeding to confer the privilege of an exemption from its provisions, in the case of any religious corporations, the legislature must be deemed to have in mind those corporations which were the creation of the state, and not those in which it had no interest, and over which it had no control.<sup>187</sup> The act of 1892 was legislating with respect to subjects within the jurisdiction of the state; and the provision modifying the legislation, as it affected certain corporations, must be considered in the light of an exercise of the sovereign power within territorial limits. In creating this particular plan for the taxation of all property transferred to others upon, or in contemplation of, the death of its owner, the declaration of an exemption in favor of religious corporations, even though it might already exist

<sup>185</sup> Chapter 215.

<sup>186</sup> *In re Prime* (1893) 136 N. Y. 362, 32 N. E. 1091.

<sup>187</sup> *In re Balleis' Estate* (1894) 144 N. Y. 134, 38 N. E. 1007.

under previous legislation, was a wise, if superfluous, provision. To say that it was intended to include foreign religious corporations, would be to imply the grant of a privilege by the legislature, without sufficient indications of an intention so contrary to ordinary state policy and to usual statutory presumptions. This we should not do. The legislation in question dealt with property within the state, and imposed a tax, in certain cases, upon its transfer to others, or to corporations.

The exemption of "charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation," from the operation of the law, is confined to societies the property of which is exempt from taxation by the laws of Massachusetts.<sup>188</sup> Such foreign corporations are not exempted under the act of 1890,<sup>189</sup> exempting the personal estate of "any religious, educational, Bible," and other societies from taxation.<sup>190</sup> They are not exempt from taxation under the act of 1892.<sup>191</sup>

So a statute<sup>192</sup> conferring upon a foreign corporation<sup>193</sup> a limited privilege of taking and holding real estate and personal property in New York does not relieve it from taxation under these acts.<sup>194</sup>

So the United States government is not exempted from taxation under the inheritance tax as a domestic corpora-

<sup>188</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512, citing *In re Prime*, 136 N. Y. 347, 32 N. E. 1091; *Catlin v. Trustees of Trinity College*, 113 N. Y. 137, 20 N. E. 864; *Healy v. Reed*, 153 Mass. 197, 26 N. E. 404.

<sup>189</sup> Chapter 553, amending chapter 191, Laws 1889.

<sup>190</sup> *In re Prime*, *supra*.

<sup>191</sup> Chapter 399, § 2; *In re Balleis*, *supra*; *In re Fayerweather*, *supra*; *In re Taylor*, *supra*; *In re Smith's Estate*, *supra*.

<sup>192</sup> Laws 1889, c. 307.

<sup>193</sup> I. e. the American Board of Commissioners for Foreign Missions.

<sup>194</sup> *In re Prime*, *supra*.



tion. It is to be regarded as a foreign corporation, and a tax imposed upon a legacy to it is not upon the property of the United States, but the privilege of succession accorded to it by the laws of the state.<sup>195</sup>

The United States, as a body politic or corporate, being authorized and permitted by the law of the state to take personal property by will, takes cum onere, subject to all burdens and conditions imposed by law.<sup>196</sup>

"This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession to property. This view eliminates from the case the point urged by the appellant,—that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet, in contemplation of law, the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid.<sup>197</sup> So, under this rule, it is recently held that a legacy to a municipal corporation, to wit, the mayor, aldermen, and commonalty of the city of New York, for the purpose of erecting a fountain is liable to the transfer tax, and the city is not exempt by the state constitution or any statute law.\*

<sup>195</sup> *In re Merriam* (1894) *supra*, citing Code Civ. Proc. N. Y. § 3343, subd. 18; *In re Cullum's Estate* (Surr.; 1893) 25 N. Y. Supp. 701, affirmed 76 Hun, 610, 29 N. Y. Supp. 1142.

<sup>196</sup> *In re Fox*, 52 N. Y. 530, affirmed 94 U. S. 315; *In re Merriam*, *supra*; *Van Brocklin v. Tennessee*, 117 U. S. 154, 6 Sup. Ct. 670; *U. S. v. Hillegas*, 3 Wash. C. C. 70, Fed. Cas. No. 15,366.

<sup>197</sup> *Bartlett, J.*, in *Re Merriam*, *supra*.

\* *In re Hamilton's Estate*, 13 N. Y. Law J. 1384.

**§ 37. Adopted Children—Mutually Acknowledged  
Relation of Parent and Illegitimate  
Children, etc.**

The laws of New York and Connecticut and most other states relieve adopted children from the collateral inheritance tax; and in New York, by act of 1887, those persons to whom the deceased, for not less than 10 years prior to his death, stood in the mutually acknowledged relation of a parent, are excepted; and the law of Connecticut exempts the lineal descendants of such adopted children. By the New York statute of 1892,<sup>198</sup> when the property passes to "any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor, or vendor, or to any person to whom any such decedent, etc., for nor less than 10 years prior to such transfer, stood in the mutually acknowledged relation of a parent," it is not taxable unless it is personalty of the value of \$10,000 or more, when it is taxable at 1 per cent.<sup>199</sup>

Under this subject we will consider—First, the cases that have arisen respecting adopted children; second, such as come within the class of persons standing in the mutually acknowledged relation of parent to the legatee or devisee; and, third, such as concern illegitimate children.

The word "children," in these acts, does not include adopted children, but merely relates to such as are children in fact of decedent, and born in lawful wedlock. Such adopted children are therefore liable to the tax,<sup>200</sup> where not expressly exempted.

<sup>198</sup> Laws N. Y. 1892, c. 399, § 2.

<sup>199</sup> See the words "mutually acknowledged relation" discussed, in *Re Hunt's Estate*, 86 Hun, 232, 33 N. Y. Supp. 256; *contra*, in *re Stillwell's Estate* (Surr.) 34 N. Y. Supp. 1123.

<sup>200</sup> In *re Miller's Estate*, 110 N. Y. 216, 18 N. E. 139, affirming 47

In New York, owing to the passage of the amendatory act of 1887, relieving adopted children, the law became somewhat involved as to those adopted children who were liable under the previous act of 1885; but it has been held that as the former act did not repeal the latter, but was simply amendatory thereof, and not retroactive, only bequests to the adopted children of decedent dying after the act of 1887 went into effect were relieved from the tax, upon the theory that the new or changed parts of the latter act were not to be considered law at any time prior to the date of its passage;<sup>201</sup> hence the vested rights of the state, accruing under the act of 1885, as to such adopted children, liable under the latter act, still continued, notwithstanding the proceeding against them to collect the tax was not begun until after the act of 1887 went into effect.<sup>202</sup>

Finally, by further amendatory statute,<sup>203</sup> such adopted children and those persons to whom deceased stood in the mutual relation of parent, and against whom no assessment

Hun, 394; *Id.* 6 Dem. Sur. 119; *Com. v. Nancrede*, 32 Pa. St. 389; *Tharp v. Com.*, 58 Pa. St. 500; *Packard's Appeal*, 37 Leg. Int. 135; *Com. v. Ferguson*, 137 Pa. St. 595, 20 Atl. 870; *Gilmore's Estate*, 14 Pittsb. Leg. J. 113.

<sup>201</sup> *In re Miller*, 110 N. Y. 216, 18 N. E. 139, citing *Ely v. Holton*, 15 N. Y. 595. See, also, *In re Kemeys*, 56 Hun, 117, 9 N. Y. Supp. 182. But see *Fox v. Com.*, 16 Grat. 1.

<sup>202</sup> *In re Arnett*, 49 Hun, 599, 2 N. Y. Supp. 428; *In re Ryan* (Surr.) 3 N. Y. Supp. 136; *In re Cager's Will*, 111 N. Y. 346, 18 N. E. 866; *In re Thompson*, sub nom. *Warrimer v. People*, 6 Dem. Sur. 211; *Kissam v. People* (Surr.) 3 N. Y. Supp. 135; *In re Miller*, 6 Dem. Sur. 119; *In re Hendricks' Estate* (Surr.) 3 N. Y. Supp. 281; *In re Brooks*, 6 Dem. Sur. 165; *In re Kemeys*, supra. See *In re Howe*, 112 N. Y. 102, 19 N. E. 513, affirming 48 Hun, 236.

<sup>203</sup> Laws 1889, c. 479. See Appendix, I. This law took effect when signed by the governor, June 14, 1889, and not when it was passed by the legislature. *In re Kemeys*, supra. Where the assessment under the prior law was made after the passage of the act relieving adopted children, or those standing in the mutually

of the tax had been made, were "retroactively exempted" from the tax to which they were liable under the act of 1885, where no assessment of the tax had been made at the time of the passage of the amendatory act;<sup>204</sup> and thus, it would seem, all adopted children were relieved under these acts. By the act of 1892,<sup>205</sup> however, such adopted children are now taxed 1 per cent. upon all personalty of the value of \$10,000, or more.

It was considered that, unless the adoption be in conformity with the laws of the state,<sup>206</sup> the legacy to the adopted child is liable; but it is now held under the act of 1887 that an adoption under the laws of Massachusetts, the statute of that state being similar to that of New York, is sufficient to relieve such adopted child from the tax under the laws of the latter state,<sup>207</sup> and the mere use of the words "my adopted child" in the will is insufficient.<sup>208</sup>

acknowledged relation, they are not liable. In *re* Thomas, 3 Misc. Rep. 388, 24 N. Y. Supp. 713, distinguishing In *re* Kemeys, *supra*; In *re* Fenn (Dec. 28, 1894) 12 N. Y. Law J. 784.

<sup>204</sup> In *re* Hughes, N. Y. Daily Reg. July 27, 1889; In *re* Thorne's Estate (Jan. 21, 1890) 2 N. Y. Law J. 1974; In *re* Kemeys, *supra*. This does not, however, include the children of such adopted children. In *re* Bird's Estate (Surr.) 11 N. Y. Supp. 895.

<sup>205</sup> Chapter 399, § 2.

<sup>206</sup> Laws N. Y. 1873, c. 830. And see this question discussed by Kennedy, S., in *Re* Spencer (Surr.) 4 N. Y. Supp. 395. But see In *re* Butler, 58 Hun, 400, 12 N. Y. Supp. 201.

<sup>207</sup> In *re* Butler, *supra*, the court said: "This statute does not require the proceedings for adoption to be under the laws of this state, but to be in conformity with them, and to correspond in character and manner with them, wherever they are conducted, and an examination of the proceedings in Boston for the adoption of this child shows that they conform substantially to the requirements of our statute. There is no reason for a severe construction of this statute. The boy was legally adopted under laws substantially similar to our

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<sup>208</sup> In *re* Gardner's Estate, N. Y. Daily Reg. March 4, 1889.

So, it seems, an act of the legislature giving an adopted child the right to inherit does not relieve him from the tax;<sup>209</sup> and where an adopted child possessing a personal estate dies unmarried and intestate, leaving a parent by nature surviving, the latter is the heir, to the exclusion of the adopted parents, and is exempt.<sup>210</sup>

Second. In order to constitute the relation of a person standing in the "mutually acknowledged relation" of parent under the New York statute,<sup>211</sup> some time during the continuance of the intercourse between the persons between whom the relation is claimed to exist, there should be a period of dependence on the part of the younger,—a time when the latter required and received parental care, though not necessarily a dependence for support and maintenance. The relation must therefore begin in youth, though not of necessity during legal minority; and it should not be confounded with relations in which the parental element is lacking. A step-parent does not necessarily stand in the relation of parent, within the meaning of the act. Whether the parties do or not depends upon the circumstances of each case.<sup>212</sup> And while it is necessary that adoption

own, so far as the mode of procedure is concerned, and that is sufficient to answer the requirements of this law." This is a liberal construction of the act of 1887, because the language of the act is express that the adoption should be "in conformity with the laws of the state of New York."

<sup>209</sup> *Com. v. Nancrede*, 32 Pa. St. 389; *Wayne's Estate*, 2 Pa. Co. Ct. R. 93; *Tharp v. Com.*, 58 Pa. St. 500; *Packard's Appeal*, 37 Leg. Int. 135.

<sup>210</sup> *Com. v. Powell*, 1 Montg. (9 Penn.) 66; 16 Wkly. Notes Cas. 297.

<sup>211</sup> Acts 1887 and 1892, Appendix, I. See the words "mutually acknowledged" defined in *Re Hunt's Estate* (1895) 86 Hun, 232, 33 N. Y. Supp. 256; In *re Moulton's Estate* (1895) 11 Misc. Rep. 694, 33 N. Y. Supp. 578.

<sup>212</sup> In *re Capron's Estate* (Surr.) 10 N. Y. Supp. 23.

should be in strict conformity to law, in order to bring the devisee or legatee within the clause exempting persons to whom the deceased, for not less than 10 years prior to his or her death, stood in the mutually acknowledged relation of a parent, it seems it is not necessary that there should be any express agreement between the parties; but the relation may be shown to exist by facts and circumstances tending to disclose it. Hence, where all the relations between the parties—an aunt and a niece—were parental in their intent, character, and results, acts and conduct are of themselves evidence by which a parental relation may be established, and the absence of the use of the words “mother and child” do not affect the result intended by both parties.<sup>213</sup> Where decedent and the legatees were not related, nor had ever been legally adopted by decedent, but began residing with decedent early in infancy, having no home of their own and no means of support, and were maintained and educated by decedent, assumed her name, called her “mother,” and she exercised the same parental care over, and manifested the same affection for, each of them as if they had in fact been her own children, held sufficient to constitute the mutually acknowledged relation of parent and child under the statute,<sup>214</sup> and that the legacies to such children were exempt.<sup>215</sup>

To prove that decedent and a child stood in the mutually acknowledged relation of parent and child for 10 years, no evidence of formal adoption is required; mutual acknowledgment is enough, and this may be proved by the facts and circumstances.<sup>216</sup>

<sup>213</sup> In re Spencer (Surr.) 4 N. Y. Supp. 395; In re Capron's Estate, supra; In re Butler, 58 Hun, 400, 12 N. Y. Supp. 201.

<sup>214</sup> Laws 1887, c. 713.

<sup>215</sup> In re Thomas (1893) 3 Misc. Rep. 388, 24 N. Y. Supp. 713.

<sup>216</sup> In re Butler, 58 Hun, 400, 12 N. Y. Supp. 201; In re Spencer (Surr.) 4 N. Y. Supp. 395.

And where decedent lived in the family of G., her deceased sister's husband, as housekeeper, on land of which she and her sister's adult children were tenants in common, held facts showing that the relation of parent and child between decedent and said children existed during the life of G., their father.<sup>217</sup>

Where the facts show that the relation of parent and child existed for a less period than 10 years prior to decedent's death, there can be no exemption from taxation on the ground of a mutually acknowledged relation of parent and child.<sup>218</sup>

An annuity bequeathed to a legatee whom, for over 40 years, testator treated in every particular the same as he did his own daughters, and for whose comfort and welfare he showed the same solicitude as for the latter, is exempt from taxation under the statute<sup>219</sup> providing that transfers of property "to any person to whom any such decedent, grantor, \* \* \* for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent," notwithstanding the legatee was not related to, and was never adopted by, the testator, and though merely referred to in his will as "our friend."<sup>220</sup>

Testator did not stand in the mutually acknowledged relation of parent to a legatee, so as to exempt the legacy from taxation, where he did not support or educate her, and she was not in any way dependent on him, but he merely lived in the family of his sister, who was legatee's mother,

<sup>217</sup> In re Sweetland's Estate (1892; Surr.) 20 N. Y. Supp. 310, distinguishing In re Spencer, supra.

<sup>218</sup> In re Sweetland's Estate, supra; In re Gardner's Estate, N. Y. Daily Reg. March 4, 1889.

<sup>219</sup> Laws 1892, c. 399, § 2.

<sup>220</sup> In re Wheeler's Estate (1892) 1 Misc. Rep. 450, 22 N. Y. Supp. 1075.

and contributed to the support of the family in common with the other members thereof, including the legatee.<sup>221</sup>

The court said: "The purpose and intent of that part of section 2 of the transfer act which exempts property which passes to one who, for not less than 10 years prior to the transfer, stood in the mutually acknowledged relation of a child, was to include among those exempted persons, who may not have been legally adopted, but, nevertheless, stood in the same relation as children, and were acknowledged and recognized as such. The word 'acknowledge' would seem to indicate that it was necessary that the deceased person had held the person to whom the transfer was made out to the world as a child, or as one to whom he bore that relation, or that he treated and considered such a one as a child; and the word 'mutually' would seem to require that such a relation was mutual, and that the character of the relation was reciprocal. However close the relations may have been, and however affectionate each may have been for the other, still the case would not come within the meaning of the statute, unless the relation was generally understood and acknowledged to be that of parent and child. \* \* \* In the various cases decided in which it has been held that transfers were exempt because the mutually acknowledged relation of parent and child existed, the children were taken into the family of the deceased, and were made members of the family, and lived and grew up as members of the family, and were recognized and considered as such."

The mutually acknowledged relation of parent and child under the New York statute of 1892 is not made out where the facts showed that the legatee was a niece of the decedent, and had lived in his household for over 10 years; that he called her "daughter" many times, but she never

<sup>221</sup> In re Moulton's Estate (1895; Surr.) 33 N. Y. Supp. 578.



called him "father," always addressing him as "uncle." He supported her, and gave her a stipulated sum besides, but always introduced her as his niece; never as his daughter. At the time she went to live with him, he exacted a promise from her that she would never leave him, and she never did leave him, for a week at a time. For nine years she was never away from him for a night. She had charge of his household, though for many years preceding his death he lived at an hotel. When talking with her about his will, he said the greater part of his estate was due to his brother, to whom he was very grateful for having saved him from bankruptcy at a critical period of his business career, but that he intended to care for her the same as he did for his brother's children. Held, that the relation was not made out.<sup>222</sup>

But what would seem to be a wide departure from the construction adopted by the earlier cases upon this subject was held by the supreme court in *Re Hunt*,<sup>223</sup> on appeal from the surrogate. A construction was placed upon the language of the act which substantially restricts the mutually acknowledged relation of parent only to illegitimate children of the person from whom the property was derived. In the *Hunt Case* the person claiming the relation was a niece of decedent.

Van Brunt, P. J., said: "It seems to us, however, that an examination of the act clearly shows what the mutual acknowledgment of the relationship referred to in the act is

<sup>222</sup> In *re Hunt*, N. Y. Law J. Dec. 11, 1894, affirmed 86 Hun, 232, 33 N. Y. Supp. 256, citing *In re Butler*, 58 Hun, 403, 12 N. Y. Supp. 201; *Weston v. Goodrich*, 86 Hun, 194, 33 N. Y. Supp. 382; *In re Spencer (Surr.)* 4 N. Y. Supp. 395; *In re Wheeler's Estate (Surr.)* 22 N. Y. Supp. 1075.

<sup>223</sup> In *re Hunt (Surr.)* 33 N. Y. Supp. 256, followed in *Re Conklin (May 21, 1895)* 13 N. Y. Law J. 514, Fitzgerald, S. The *Hunt Case* has recently been dissented from, distinguished, and criticised, in *Re Stillwell's Estate (Surr.)* 34 N. Y. Supp. 1123.

intended to cover: First is mentioned the legitimate child, next is mentioned the adopted child, and next, we think, is intended to be mentioned the illegitimate child who has been for 10 years acknowledged as the testator's child, and such acknowledgment has been mutual. That the question of legitimacy was in the mind of the framers of the statute is manifest from the next clause of the section in question. It says: 'Or to any lineal descendant of such decedent, grantor, donor, or vendor born in lawful wedlock,'—thereby excluding from lineal descendants any other person excepting those descending from the legitimate child. It is significant that the words 'lawful wedlock' are used in respect to this matter of lineal descendants immediately after the mutual acknowledgment, and that it had not been at all considered necessary to refer to it when a child or children were spoken of in the previous part of the section. It is evident that it was intended to limit the exemption of illegitimate descendants to the child, and not to extend the same to the descendants of such children. \* \* \* All that the clause in question seems to have been intended to cover was the case where an illegitimate child had been recognized by its parents, and such recognition was mutual, and had continued for ten years. In such a case it was intended that the legatee should have the benefit of the statute. We cannot imagine how it could have been the intent of the legislature to have made it possible to acknowledge or recognize a relationship which had no foundation in fact. \* \* \* So, in the statute, the parent acknowledges his illegitimate child, and the child acknowledges his parent, and the mutual acknowledgment provided for by the statute takes place."

There are several objections to this construction as being too narrow and restricted in its application:

(1) That part of the language of the act relating to the subject is as follows: "When the property \* \* \* passes

\* \* \* to or for the use of any father," etc., "or to any person to whom any such decedent, grantor, donor, or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, or to any descendant of such decedent \* \* \* born in lawful wedlock." The words "any person" would seem to be comprehensive enough to include other persons than illegitimates, but to hold that they include only illegitimate children is to exclude every other person from relief under this clause of the statute.

(2) This construction, in its results, not only conflicts with that arrived at by the cases decided under the act of 1887, but also with cases decided under the act of 1892. The precise language of the act of 1887 is embodied in the act of 1892. Under the former act the relationship was applied indiscriminately to all persons (the statute says "any person"), irrespective of the fact as to whether they were connected by blood with decedent or not. Nieces were held to be within the statute where the relation was made out.\*

So persons, strangers in blood to decedent, were held within the statute in several cases.<sup>224</sup>

There is nothing in the act of 1892 which shows that the legislature intended to make any change in the law as it stood in 1887, except to impose a tax of 1 per cent. upon the persons enumerated therein. If *In re Hunt* is correctly decided at the general term,<sup>225</sup> then all the cases decided under the acts of 1887 and 1892 are erroneous. The case has recently been criticized and dissented from in an able opinion by Keeler, S.†

\* *In re Capron* and *In re Spencer*, supra.

<sup>224</sup> *In re Thomas*, supra; *In re Sweetland's Estate*, supra; *In re Wheeler's Estate*, supra.

<sup>225</sup> It was followed by Fitzgerald, S., in *Re Conklin*, supra.

† *In re Stillwell's Estate* (Surr.) 34 N. Y. Supp. 1123, citing *In re*

Where the testator died prior to the act of 1887 (chapter 713), providing for the exemption of children where decedent stood in the mutually acknowledged relation of parent, the legatees are not entitled to exemption upon this ground under the statute.<sup>226</sup>

Third. But the interest of an illegitimate child is taxable;<sup>227</sup> and where an illegitimate son was legitimated by act of legislature, approved a day after the intestate's death, it was held that the tax, having already vested, was not affected by the act.<sup>228</sup> The intention of the legislature must be clearly expressed in order to relieve such children. Hence no inference that the legislature intended to relieve illegitimate children from the tax will be drawn from the mere fact of legitimation.<sup>229</sup>

An illegitimate child, however, legitimated by act of assembly, with all the rights and privileges of a child born in lawful wedlock, is exempt.<sup>230</sup> An illegitimate son adopted by decedent, pursuant to an act of the legislature which authorized him to inherit decedent's estate and property as fully as if he had been begotten in lawful wedlock, is not thereby legitimated, and a devise to him by decedent is subject to taxation. Whether, if the act had legitimated the

Butler, 58 Hun, 400, 12 N. Y. Supp. 201; *In re Spencer's Estate* (Surr.) 4 N. Y. Supp. 395.

<sup>226</sup> *In re Fenn*, N. Y. Law J. Dec. 28, 1894.

<sup>227</sup> *In re Wharton's Estate*, 10 Wkly. Notes Cas. 105. And see *In re Miller*, 110 N. Y. 221, 18 N. E. 139; *Com. v. Ferguson*, 137 Pa. St. 395, 20 Atl. 870. For a review of legislation upon the subject of illegitimates in Pennsylvania, see *In re Kennedy's Estate*, 27 Wkly. Notes Cas. 254.

<sup>228</sup> *Galbraith v. Com.*, 14 Pa. St. 258; *Wayne's Estate*, 2 Pa. Co. Ct. R. 93; *Com. v. Stump*, 53 Pa. St. 132. But see *Tharp v. Com.*, 58 Pa. St. 500.

<sup>229</sup> *Physick's Estate*, 2 Brewst. 200.

<sup>230</sup> *Gilmore's Estate*, 14 Pittsb. Leg. J. 113; distinguishing *Com. v. Nancrede*, 32 Pa. St. 389, and cases supra.

son, the tax would have been payable, was not decided.<sup>231</sup> Under the English legacy act, illegitimate children subsequently legitimated by marriage of their parents are not within the term "strangers to the blood," but inherit as children, and hence pay the lower grade of duty.<sup>232</sup> But where the children were illegitimate, not born in lawful wedlock, nor acquiring the status of legitimacy by the subsequent marriage of their parents, they were held to be strangers in blood, and liable to duty at 10 per cent.<sup>233</sup>

### § 38. Widows, and Husbands of Deceased Daughters.<sup>234</sup>

In some of the states the wife or widow of a son, or the husband of a daughter,<sup>235</sup> are exempted, and also the widow of the decedent.

Where the widow of decedent is provided for in the will, but refuses to take thereunder, and elects to claim her dower in the estate, which is set aside, such dower is not subject to the tax, notwithstanding the fact that by agreement she takes less than the law would have allowed;<sup>236</sup> but where the legatee married decedent's son, but such son had died, and the legatee had subsequently married before decedent's death, she does not come within the term "widow," and the legacy to her is not therefore exempt.<sup>237</sup> The court said:\*

<sup>231</sup> *Com. v. Ferguson* (1890) 137 Pa. St. 595, 20 Atl. 870; following *Com. v. Nancrede*, 32 Pa. St. 389. See *In re Gilmore's Estate*, 14 Pittsb. Leg. J. 113.

<sup>232</sup> *Skottowe v. Young*, L. R. 11 Eq. 474.

<sup>233</sup> *Atkinson v. Anderson*, 21 Ch. Div. 100.

<sup>234</sup> See *In re Woolsey*, 19 Abb. N. C. 232, note.

<sup>235</sup> See statutes of New York, Pennsylvania, Connecticut, and Maryland, Appendix, I., III., VII., VIII.

<sup>236</sup> *Appeal of Commonwealth*, 34 Pa. St. 204.

<sup>237</sup> *Com. v. Powell*, 51 Pa. St. 438.

\* Page 441.

"The testatrix did not die until after the second marriage of the devisee, and the property does not vest in and pass to her until testatrix's death. At that time she was not within the class of exempts, and not entitled to take the property clear of the tax."

On the other hand, it has been held that the exemption from taxation of a devise or a bequest in favor of the husband of a daughter is unaffected by the circumstance of the death of the daughter occurring before that of the testator, her parent, as the word "daughter" would seem to include a deceased daughter.<sup>238</sup>

### § 39. Next of Kin—Lineal and Lawful Descendants.

By all the state statutes, persons embraced within these terms are generally exempted. In New York, Ohio, and Illinois, however, lineal heirs are now taxed.<sup>239</sup> The term "lawful or lineal descendants" includes only the direct descendants of the testator or intestate, and does not include the children of the brothers and sisters of the decedent.<sup>240</sup> The lineal descendants exempted from the tax under the New Jersey statute are those of the deceased person only.<sup>241</sup>

The share of a grandmother was held taxable in Pennsylvania under the act of 1833, exempting father, mother, husband, wife, children, and lineal descendants, there being no nearer kindred of the intestate than such grandmother; it being held that the next of kin under the act should be

<sup>238</sup> *In re McGarvey*, 6 Dem. Sur. 145; *In re Woolsey*, 19 Abb. N. C. 233, note.

<sup>239</sup> Statutes of New York and Ohio, Appendix, I., VI.

<sup>240</sup> *In re Miller*, 5 Dem. Sur. 132, affirmed 45 Hun, 244; *In re Smith*, 5 Dem. Sur. 90; *In re Jones*, *id.* 30. See *In re Hunt's Estate* (Sup.) 33 N. Y. Supp. 256.

<sup>241</sup> *Van Riper v. Happenheimer*, 17 N. Y. Law J. (Feb. 1894) p. 49.

ascertained by rule of the civil, and not of the canon, law.<sup>242</sup>

But property devised to testator's daughter, in trust, for life, with power of appointment by will <sup>243</sup> in the life tenant, which the daughter by will devised to her brothers and sisters and their children, being lineal descendants of her father, is not liable.<sup>244</sup>

And property bequeathed to an executor individually, but which, by agreement between him and the testatrix, was to be in trust for her brother, is exempt.<sup>245</sup>

#### § 40. Aliens, Foreign Legatees, and Nonresidents.

This subject has already been considered as to the constitutional questions involved,<sup>246</sup> and elsewhere with reference to questions of domicile and situs.<sup>247</sup> Under the statutes no tax is generally imposed on aliens as such save in Louisiana, where, however, the tax is only due by such alien heirs as become entitled to succession open in the state after the passage of the law.<sup>248</sup>

But while the law of that state imposes the tax upon

<sup>242</sup> *McDowell v. Addoms*, 45 Pa. St. 430. And see rules relative to collateral and lineal consanguinity under these acts discussed per Woodward, C. J.

<sup>243</sup> See chapter 6, § 60.

<sup>244</sup> *Com. v. Williams*, 13 Pa. St. 29; *Com. v. Sharpless*, 2 Chest. Co. R. (Pa.) 246; *Com. v. Schumacher*, 9 Lanc. Bar (Pa.) 199; *Hackett v. Com.*, 102 Pa. St. 505.

<sup>245</sup> *In re Farley*, 15 N. Y. St. Rep. 727. Contra, *Cullen v. Attorney General*, L. R. 1 H. L. 890. As to death by drowning, mother and children, presumption of survivorship, collateral inheritance tax, see *Clymer's Estate* (1885) 16 Wkly. Notes Cas. 36.

<sup>246</sup> Chapter 2, § 26.

<sup>247</sup> Chapter 4.

<sup>248</sup> *Succession of Oyon*, 6 Rob. (La.) 504; *Succession of Deyraud*, 9 Rob. (La.) 357.

nonresident aliens and alien heirs and citizens residing abroad, nonresident heirs who are citizens of any other state of the United States are exempt.<sup>249</sup>

Under these statutes it has been held that the word "estate" is synonymous with the word "successor."<sup>250</sup>

### § 41. What Estates or Interests Taxable—Amounts Limited.

Many, if not all, of these statutes, exempt small legacies or estates from taxation, generally ranging from \$250 to \$10,000.<sup>251</sup> And in Ohio, under the direct tax act, estates of less than \$20,000 are not taxable. The question has generally been whether these exemptions refer to the estate of the decedent or the share of the legatee,—a conclusion depending generally upon the statutory language used. In New York, under the acts of 1885 and 1887, the rule was that the tax was imposed, not upon the whole of decedent's estate, passing by will or intestate law, unless the whole descend to collaterals, and be thus made taxable, but upon that specific part or interest passing to nonexempt persons, heirs, devisees, or legatees<sup>252</sup> (the word "estate" in the act referring to the last-named persons), unless the testator

<sup>249</sup> *Louisiana v. Peydras*, 9 La. Ann. 165, 18 How. (U. S.) 192.

<sup>250</sup> *New Orleans v. Stewart's Estate*, 28 La. Ann. 180.

<sup>251</sup> Massachusetts, New York, California, and Illinois.

<sup>252</sup> See chapter 7, § 64; *In re Howe*, 112 N. Y. 103, 19 N. E. 513, affirming 48 Hun, 235, overruling *In re Chardavoyne*, 5 Dem. Sur. 466; *In re Cager's Will*, 111 N. Y. 443, 18 N. E. 866; *In re Sherwell's Estate* (1891) 125 N. Y. 376, 26 N. E. 464; *In re Hall* (Sup.) 34 N. Y. Supp. 616; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311; *In re Clark's Estate* (Surr.) 5 N. Y. Supp. 199; *McVean v. Sheldon*, 48 Hun, 163, overruling *In re Miller*, 5 Dem. Sur. 132. See *In re Thompson*, 14 N. Y. St. Rep. 487; *In re McCready*, 10 N. Y. St. Rep. 696; *In re Smith*, 5 Dem. Sur. 90; *In re Robertson*, Id. 92; *In re Hopkins*, 6 Dem. Sur. 1; *In re Howard*, 5 Dem. Sur. 483; *In re*



direct that the tax be paid, not by the taxable interest, but out of his general estate, in which event the executor must pay the tax.<sup>253</sup>

It was finally determined in New York, under the acts of 1887 and 1891, that, if the inheritance or testamentary gift amounted to \$500 or more, then the act operated to create a liability in favor of the state to the extent mentioned, but, if it was less, the act was wholly inoperative, and that the tax was upon the share of the legatees, and not upon the estate.<sup>254</sup>

This condition of the law is evidenced by the remarks of the court:<sup>255</sup> "In construing the inheritance tax law as it stood prior to the act of 1892, we had occasion to decide that it imposed a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally, and in their respective shares or proportions, and not upon the property or estate of the de-

Jones, *Id.* 30; *Com. v. Smith*, 5 Pa. St. 144; *Com. v. Smith*, 20 Pa. St. 104; *Com. v. Kerchner*, 24 Wkly. Notes Cas. 260. The words, "being within the commonwealth," in the Pennsylvania statutes, were held to refer to the property, and not to the person, of decedent, but by subsequent statute they were made to refer to both. *Com. v. Smith*, *supra*; *In re Short's Estate*, 16 Pa. St. 63; *Carpenter v. Com.*, 17 How. (U. S.) 461; *State v. Dalrymple*, 70 Md. 294; 17 Atl. 82. See *Appeal of Commonwealth (Bittinger's Estate)* 129 Pa. St. 338, 18 Atl. 132.

<sup>253</sup> See chapter 7, § 64; also, *In re Thompson's Estate*, 5 Wkly. Notes Cas. 19; *Shippen v. Burd*, 42 Pa. St. 461; *In re Horter's Estate*, 1 Pears. 424; *In re Murphy's Estate*, 4 Pa. Co. Ct. R. 336; *In re Holbrook's Estate*, 3 Pa. Co. Ct. R. 265; *Com. v. Boyle*, 2 Del. Co. Rep. (Pa.) 335. But see *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

<sup>254</sup> *In re Sherwell's Estate* (1891) 125 N. Y. 376, 26 N. E. 464; *Id.* (Sup.) 12 N. Y. Supp. 200; *In re Sterling* (1894) 30 N. Y. Supp. 386; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311; *Id.*, 76 Hun, 399, 27 N. Y. Supp. 1086; citing *Cager's Will*, *supra*; *In re Howe*, *supra*; *In re Hall*, *supra*.

<sup>255</sup> *In re Hoffman's Estate*, *supra*.

cedent. The shares received, in the hands of the recipients, were the measures of the right which was subjected to assessment, and the imposed tax could be enforced personally against the successor charged. One effect of this construction manifested itself when a question arose over the provision which limited the assessment to estates of five hundred dollars or over. \* \* \* We solved that problem in two cases;<sup>256</sup> \* \* \* and the word 'estate,' to which the limitation of \$500 was attached, must necessarily mean the estate received by the particular successor, and not that of the testator or intestate upon which, as such and in the aggregate, no tax was imposed." The question then arose under the transfer tax act of 1892 as to whether, in view of its modification of the prior law, the tax was imposed upon the decedent's estate, or upon the share of the successor thereto.

Under this statute,<sup>257</sup> a tax is now imposed upon two classes: First, a tax of 5 per cent. upon property of the value of \$500 or over passing to certain collateral heirs and strangers,—i. e. to persons or corporations not exempt by law from taxation on real and personal property;<sup>258</sup> second, a tax of 1 per cent. upon lineal heirs of decedent and others specified;<sup>259</sup> the act providing in relation to this class that "such transfer of property shall not be taxable under this act, unless it is personal property of the value of \$10,000 or more." The words "estate" and "property" are defined by the act<sup>260</sup> to mean the property or interest therein of the testator, intestate, etc., passing or transferred to those not specially exempted from the provisions of the act, and not as the property or interest therein passing to

<sup>256</sup> *In re Cager*, and *In re Howe*, *supra*.

<sup>257</sup> Laws 1892, c. 399, §§ 2, 3.

<sup>258</sup> *Id.* § 1.

<sup>259</sup> *Id.* § 2.

<sup>260</sup> *Id.* § 22.

individual legatees, etc. The word "transfer" was defined to include the passing of property or any interest therein, etc., by inheritance, descent, devise, bequest, grant, deed, bargain, sale, or gift. In considering the question as to the meaning of the \$10,000 clause, the lower courts held, in pursuance of decisions under the previous acts,<sup>261</sup> that the limit of \$10,000 did not relate to the property of the decedent, but to the shares of the legatees or lineal heirs, thus making it possible for a testator to avoid the tax by reducing intended legacies of \$10,000 to lineals to a sum slightly below that amount. The court of appeals overruled this construction, and held that the portion of the statute providing that property passing to lineal heirs is exempt from taxation, "unless it is personal property of the value of \$10,000 or more,"<sup>262</sup> meant the estate or property of the testator, and not that of the devisee or legatee; and hence if the aggregate estate of a decedent passing under this clause is of the value of \$10,000 or more, and passes to lineals, it is liable to taxation, notwithstanding the shares of the legatees may be less than that sum.<sup>263</sup>

Finch, J., said: "The first question presented on this appeal, relating to a life estate bequeathed to the mother of the testatrix, and valued at less than \$10,000, must be decided, as it always has been in similar cases hitherto, in favor of the legatee, unless in that respect the law of 1892 has

<sup>261</sup> See *In re Hoffman's Estate*, 76 Hun, 399, 27 N. Y. Supp. 1086, citing *In re Howe*, 112 N. Y. 100, 19 N. E. 513.

<sup>262</sup> 1 Rev. St. tit. 4, pt. 1, c. 1, § 21.

<sup>263</sup> *In re Hoffman's Estate*, supra. See, also, *In re Taylor's Estate* (1893) 6 Misc. Rep. 277, 27 N. Y. Supp. 232; *In re Hoffman's Estate*, 5 Misc. Rep. 439, 26 N. Y. Supp. 888, citing *In re Flynn's Estate* (Surr.) 30 N. Y. Supp. 388, and distinguishing *In re Wheeler's Estate*, 1 Misc. Rep. 450, 22 N. Y. Supp. 1075. See *In re Ludlow's Estate*, 4 Misc. Rep. 594, 25 N. Y. Supp. 989; *In re Millward's Estate*, 6 Misc. Rep. 425, 27 N. Y. Supp. 286; *In re Hall* (Sup.) 34 N. Y. Supp. 616.

changed the necessary interpretation. But I think it has, and that such result was directly and consciously intended by the legislature. \* \* \* I am unable to understand the entirely new provision of section 22, unless its purpose is to compel a change of our previous construction, and require us to attach the limitation of \$10,000 of value to the estate of the decedent, and not to the several and particular estate passing to the successor."

In referring to section 22 above, the court said:

"It will be observed that the idea of the lawmaker is explained by declaring, not only what the words 'estate' and 'property,' as used in the act, shall mean, but also what they shall not mean; and the negation is a denial in terms of the precise construction which this court had previously adopted in determining what was meant by the word 'estate' when used ambiguously and without qualifying words, as it was used in connection with limitations of value. \* \* \* Nothing, therefore, in these definitions, can be permitted to touch our general doctrine of the nature of the tax. But what, then, do they touch, and what purpose do they subserve? We must look for some place in the act where the word 'property' is used by itself, and, to some extent, ambiguously, and therefore needs the help of a definition. We find such a possible place in section 2, where the phrase is 'unless it is personal property of the value of ten thousand dollars or more.' That may mean the aggregate value of all the property transferred to taxable persons, or the separate value of each several transfer. We had said that it meant the latter, but now comes the legislature declaring that the word 'property' shall mean what passes to those not exempted, and not what passes to individual transferees. While the prohibition cannot apply to the general theory of the tax, it can apply to this description of a specific limitation.

"We had said it related to the property of individual

transferees, but that construction section 22 was intended to forbid and prevent. If it does not mean that, I am unable to perceive any office it can perform, or any useful purpose it can subserve. That effect, I think, we are bound to give it, since we can do so without disturbing the scope of the act, and in view of the legal situation which existed and the possible evil which it was thought prudent to prevent.

"And so we are prepared to say that the interest of the mother is taxable at one per cent., although itself of a value of less than \$10,000, because the aggregate transfers by the will to taxable persons exceeded that amount."

While it is true that Finch, J., in the beginning of his opinion, suggested <sup>264</sup> that the tax was one upon the right of succession, and added that it was levied upon successors in respect to the shares to which they succeed, and not upon the decedent's estate as such, yet the language of the opinion cited above shows clearly that the court adjudged otherwise; and under these adjudications the rule would now seem to be settled in New York, under the act of 1892, that the tax is not, as formerly, upon the share or interest passing to the legatee or devisee, but upon the aggregate value of the testator's or decedent's estate passing to taxable persons, whether of the lineal or collateral class.

So it has been held under the \$500 clause of the New York act of 1892 that in every case where property, real and personal, of the value of \$500 or more, passes to persons or corporations (collaterals) not exempt from taxation, the liability to tax at the rate of 5 per cent. exists, and the liability is not affected by the size of the individual shares.<sup>265</sup> The property exempted under this clause is not the property passing to the legatee, which must be less than

<sup>264</sup> In re Hoffman's Estate, *supra*.

<sup>265</sup> In re Taylor's Estate (Surr.; 1893) 27 N. Y. Supp. 232.

\$500 in order to entitle the same to exemption, but the amount of all property passing to legatees of the unexempted class, which must be less than \$500. If the aggregate estate passing to nonexempt persons is \$500 or over, it is taxable, notwithstanding the individual legacies are under that amount.<sup>266</sup> It is the "transfer" that is taxed, and not the "estate" of the beneficiaries respectively. It is the property as a whole as it descends from the decedent, and not the separate parcels into which it may be divided, whether the tax falls under the 1 per cent., or under the 5 per cent. provision. This view is in harmony with the evident policy of the law that all property of the decedent shall be subject to the tax, except in small estates of less than \$500.<sup>267</sup>

The exemption in the statute of Maine<sup>268</sup> providing that all property which shall pass by will or by the intestate laws of the state "shall be liable to a tax of two and one-half per cent. of its value, above the sum of \$500," is not an exemption from the corpus of the estate, but is an exemption of that sum from each and every legacy or share given or descending to persons within the classes subject to the excise.<sup>269</sup>

"It is also contended that the tax is unreasonable on account of the exemption contained in the proviso of the first section of the statute. In all, or nearly all, systems of taxation, there are some exemptions, but the objection here is that estates whose value, after payment of all debts, shall not exceed \$10,000, are exempt, without regard to the value of the property received by the devisees, etc.

<sup>266</sup> *In re Flynn's Estate* (Surr.; 1893) 30 N. Y. Supp. 388; *In re Hall* (Sup.) 34 N. Y. Supp. 616. Contra, *In re Sterling's Estate* (Surr.; 1894) 30 N. Y. Supp. 385.

<sup>267</sup> *Ward, J., in Re Hall* (Sup.) 34 N. Y. Supp. 616; citing *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311.

<sup>268</sup> *Laws 1893, c. 146, § 1, Appendix, V.*

<sup>269</sup> *State v. Hamlin* (1894) 86 Me. 495, 30 Atl. 76.

"It is argued that the excise, if upon the privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege tax can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property. The tax, too, has some of the characteristics of a duty on the administration of estates. \* \* \*

"The statutes of the different states and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the values of the estates, and sometimes to the value of the property received by the heirs, etc. The exemption in the statute under consideration is certainly large as an exemption of estates, but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void." <sup>270</sup>

Under the New York statute, which exempts all estates from the tax that may be valued at a less sum than \$500, it was held that a legacy of that amount not by law payable until a year after decedent's death is not subject to the tax, as its "clear market value" at the time of death was less than \$500.<sup>271</sup> The settled rule now is that, if the legacy

<sup>270</sup> Field, C. J., in *Minot v. Winthrop* (1894) 162 Mass. 116, 38 N. E. 516.

<sup>271</sup> In *re Peck's Estate* (Surr.) 9 N. Y. Supp. 465, followed in *Re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239, citing *Thorn v.*

amounts to \$500 or over, a liability in favor of the state is created. If the value of the legacy is less than \$500, the act is wholly inoperative.<sup>272</sup>

In Pennsylvania an estate which may be valued at less than \$250 is exempt. Under this clause of the statute, as under the New York cases, it is held that the word "estate" does not refer to the interest of the legatee, but to the property of the decedent; hence, although the legacies are under that sum, if the total value of the estate exceeds \$250, such legacies are taxable, one of the reasons given being that otherwise a testator might divide a large estate into innumerable small legacies of less than \$250, and thus defeat the tax.<sup>273</sup>

While this question was for a time unsettled in Pennsylvania,<sup>274</sup> it has been finally held by the supreme court that the liability to the tax is to be determined, not by the amount of the legacy, but by the clear value of decedent's estate passing to persons or bodies politic not exempt from taxation. If the net value of the estate to be distributed exceeds \$250, all legacies or distributive shares passing to collaterals, etc., are liable to the tax.<sup>275</sup>

Hence, where the testator bequeathed seven legacies of

Garner, 113 N. Y. 198, 21 N. E. 149. Contra, *In re Pond*, N. Y. Daily Reg. May 25, 1889; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895. See *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866.

<sup>272</sup> *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464.

<sup>273</sup> *In re King's Estate*, 11 Phila. 27; *Com. v. Boyle*, 2 Del. Co. Rep. (Pa.) 335. Contra, *Com. v. Kerschner*, 24 Wkly. Notes Cas. 260, 6 Lanc. Law Rev. 308; *In re Evans' Estate* (1891) 8 Lanc. Law Rev. 321. See *In re Miller*, 5 Dem. Sur. 132.

<sup>274</sup> See "Current Comments and Legal Miscellany" (Philadelphia, March 15, 1891), p. 178.

<sup>275</sup> *Howell's Estate* (Appeal of Philadelphia Protestant Episcopal City Mission; 1892) 147 Pa. St. 164, 23 Atl. 403, 48 Leg. Int. 296, and 10 Pa. Co. Ct. R. 232; *Mixer's Estate*, Id. 409, 8 Lanc. Law Rev. 335. See this subject considered in connection with the New York and



\$200 each to seven charities, and the legacies amounted in the aggregate to an estate exceeding \$250, each of the legacies was held chargeable with the tax.<sup>276</sup>

### § 42. Foreign Real Estate.

Real estate situated in a foreign state, although owned by a citizen of the taxing state, unless directed by will to be converted into personalty, cannot be taxed by the latter state, as it is not within the jurisdictional power of one state to impose a succession tax upon real property beyond its jurisdiction.<sup>277</sup> In New York it has been held that such real estate belonging to a resident, even where the will directs an equitable conversion, cannot be taxed.<sup>278</sup> And under the act of 1892,<sup>279</sup> it has also been held that real estate passing by will to the widow or children of testator is not liable to taxation;<sup>280</sup> but it seems that an infant's share of the proceeds of a partition sale of land is taxable as personal property under the act of 1892,<sup>281</sup> which exempts from taxation property passing to certain lineals, "unless it is personal property of the value of \$10,000 or more, in which case it shall be taxable."<sup>282</sup>

Pennsylvania cases,—by C. B. Penrose, Esq., in 49 Leg. Int. 26; by Hanna, P. J., in 23 Atl. 403; and by Samuel H. Thomas, Esq., in 10 Pa. Co. Ct. R. 410.

<sup>276</sup> Howell's Estate, *supra*. See, also, *Mixer's Estate* (1891) 10 Pa. Co. Ct. R. 409.

<sup>277</sup> See chapter 2, § 15. Also, *In re Wolfe*, 19 N. Y. St. Rep. 263; *Miller v. People*, sub nom. *Lorillard v. People*, 6 Dem. Sur. 268; *Estate of Dewey*, N. Y. Law J. Oct. 21, 1889; *Bittinger's Estate* (Appeal of Commissioners) 129 Pa. St. 338, 18 Atl. 132.

<sup>278</sup> *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

<sup>279</sup> Acts N. Y. 1892, c. 399, § 2.

<sup>280</sup> *In re Taylor's Estate* (Surr.; 1893) 27 N. Y. Supp. 233.

<sup>281</sup> Acts N. Y. 1892, c. 399, § 2.

<sup>282</sup> *In re Stiger* (Surr.; 1894) 28 N. Y. Supp. 163.

### § 43. Legacies when Exempt under Acts of Congress.

The act of congress<sup>283</sup> imposing a tax upon legacies arising from personal property does not apply to legacies arising from real estate, although the testatrix directed its sale for the purpose of paying the legacies. In limiting the scope of the law to legacies of personal property, the inference is that it was intended to exempt such as were payable from the proceeds of real estate.<sup>284</sup> So where money is received by claimants under a deceased person's will, by virtue of a compromise contract between them and the executors, sanctioned by a court having jurisdiction, the money so received does not fall within the category of legacies or distributive shares in intestate estates, which are subject to a federal internal revenue tax.<sup>285</sup>

So money distributed by act of congress to heirs of a decedent arising out of the French spoliation claims is not a part of the estate of decedent, but a gift from congress to such heirs, and is not liable to the tax.<sup>286</sup>

An estate bequeathed to testator's brother, and, in case of his death before testator's, to the brother's executors, is not chargeable in the hands of such executors with second probate and estates duties, where such duties have been paid by the testator's executors.<sup>287</sup>

<sup>283</sup> Act Cong. July 1, 1862.

<sup>284</sup> U. S. v. Watts, 1 Bond, 581, Fed. Cas. No. 16,653.

<sup>285</sup> Page v. Rives, 1 Hughes, 297, Fed. Cas. No. 10,666. But see Brune v. Smith, 13 Int. Rev. Rec. 54, Fed. Cas. No. 2,053; Ex parte Sitwell, 59 Law T. R. 539.

<sup>286</sup> In re Kingston's Estate (1891) 28 Wkly. Notes Cas. 284.

<sup>287</sup> Attorney General v. Loyd [1895] 1 Q. B. 496.

## CHAPTER IV.

## ESTATES OF RESIDENT AND NONRESIDENT DECEDENTS.

- § 44. General Rules as to Domicile and Situs.
45. Conflict under These Statutes.
46. Resident Decedents, Their Heirs and Legatees.
- (a) As to Personalty.
- (b) Real Estate under Doctrine of Equitable Conversion.
47. Nonresident Decedents, Their Heirs and Legatees.<sup>1</sup>
- (a) The English Rule of "*Mobilia Sequuntur Personam*."
- (b) Application of the Rule in America.
- (c) The Rule as Applied to Tangible and Intangible Property.
- (d) Where Succession Takes Place, for Purposes of Taxation.
48. Foreign Legacies.<sup>2</sup>
49. Rules Where Nonresident Decedent's Debts Exceed Value of Estate.

## § 44. General Rules as to Domicile and Situs.

Perhaps some of the most complicated questions arising under these laws are those concerning the liability, for the payment of succession or legacy taxes, of estates or property, within the taxing state, belonging to nonresident or alien decedents, and passing to their heirs, devisees, or legatees by will or intestate law, and the liability of resident decedents to pay the tax where the property is situated abroad, or in a foreign state. The law upon this subject is as yet but partly developed in this country.

Generally, with respect to personal property taxes, it is

<sup>1</sup> See article on this subject by John A. McCarthy, Esq., in 32 Am. Law Reg. (N. S.) April, 1893, p. 365; also, *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23.

<sup>2</sup> As to foreign corporations, see chapter 3, § 36.

not necessary that the person and property should both be within the jurisdiction of the taxing state, but, in order to be taxable, it is sufficient if either is; and it is said that the state, at its option, may impose the tax upon tangible property within its borders, irrespective of the residence or allegiance of the owner.<sup>3</sup>

These principles may be said, with some exceptions, to be applicable to collateral inheritance, legacy, or succession taxes; and jurisdiction is conferred either by the fact of property or person being within the state, or both.<sup>4</sup>

The legislature has the power, as we have already seen,<sup>5</sup> to impose these taxes, not only where they affect citizens, but also where nonresidents or aliens claim, by inheritance or will, property actually located within the state, and also personal property situated elsewhere, but owned by a resident.<sup>6</sup>

The state can rightfully tax as the property of a resident the registered public debt of another state, although the debtor state may have exempted it from taxation, or actually taxed it.<sup>7</sup>

Under general tax laws, so far as nonresidents are concerned, it is held that such taxes are not a charge against

<sup>3</sup> Cooley, Tax'n (2d Ed.) 55, 56.

<sup>4</sup> In re Bittinger's Estate (Appeal of Commonwealth) 129 Pa. St. 338, 18 Atl. 132; In re Short's Estate, 16 Pa. St. 67; State v. Dalrymple, 70 Md. 294, 17 Atl. 82; In re Small's Estate, 151 Pa. St. 1, 25 Atl. 23. See note on "Nonresidents," 32 Am. Law Reg. (N. S., 1893) p. 365.

<sup>5</sup> Chapter 2, § 29.

<sup>6</sup> State v. Dalrymple, *supra*; *Alvany v. Powell*, 2 Jones, Eq. 51; In re Romaine's Estate (1891) 127 N. Y. 86, 27 N. E. 759; *Id.*, 58 Hun, 109, 11 N. Y. Supp. 313; Leg. Int. June 26, 1891, p. 265; 43 Alb. Law J. 513; *Thomson v. Advocate General*, 12 Clark & F. 1; In re Cigala, 7 Ch. Div. 356. But see In re James, 144 N. Y. 6, 38 N. E. 961.

<sup>7</sup> *Bonaparte v. Tax Court*, 104 U. S. 595.

the owner personally, but must be enforced against the property itself; and the state would seem to have no jurisdiction to assess the owner personally.<sup>8</sup>

### § 45. Conflict under These Statutes.

But perhaps no subject has afforded more ground for contention and conflict; in the courts of England and America, than the one concerning the liability of personal property of nonresident or alien decedents, within the taxing state.<sup>9</sup>

And the question has generally been whether the domicile of the owner, or the situs of the property, should be taken as the governing principle or basis for ascertaining the liability to such taxes; some courts adopting the domicile, and others the situs, as the ground of such liability.

This conflict will be found to have become more or less complicated by several considerations, among others:

(a) By the application, to a greater or less extent, of the maxim, "*Mobilia sequuntur personam*."<sup>10</sup> This rule has been applied fully in the English courts under the legacy act, and, in a restricted sense, under the succession act.

<sup>8</sup> Cooley, Tax'n (2d Ed.) 21; citing *People v. Supervisors of Chenango Co.*, 11 N. Y. 563; *Hilton v. Fonda*, 86 N. Y. 339. As to when property sent here for investment by foreigners is exempt from taxation after owner's death, see *In re Smith's Estate* (Surr.) 4 N. Y. Supp. 467.

<sup>9</sup> See Layton on Succession and Legacy Duties, introduction to fifth edition. See article entitled "Collateral Inheritance Tax in Connection with Transfer of Stocks and Loans by Foreign Executors and Administrators," *Alb. Law J.* April 16, 1892, p. 331, by E. H. Blanc, Esq.

<sup>10</sup> See *Pullman's Palace Car Co. v. Pennsylvania* (1891) 141 U. S. 18, 22, 11 Sup. Ct. 876, affirming 107 Pa. St. 156; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23; 32 Am. Law Reg. (N. S.) 365; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; 5 Pol. Science Quart. Dec., 1890, p. 646; *In re James*, 144 N. Y. 6, 38 N. E. 961.

(b) By the distinction made, under this maxim, in certain American courts, especially in Pennsylvania, and recently in New York,<sup>11</sup> between tangible and intangible property, which will hereafter be considered.

(c) And, on the other hand, by the application in many states of doctrines of public policy, so as to tax nonresident or alien estates equally with those belonging to residents, and thus prevent discrimination between the two classes.<sup>12</sup>

(d) By questions of construction naturally arising in different courts in construing different statutes.

The principles enunciated by the courts, under these statutes, concerning the liability of the estates of resident and nonresident or alien decedents, will be treated in the order following:

#### § 46. Resident Decedents, Their Heirs and Legatees.

##### (a) *As to Personalty.*

While, under property tax laws, it is not the general rule to tax the personalty of a resident of the taxing state, the actual situs of which is in a foreign state or country,<sup>13</sup> this would seem to be constantly done under legacy or succession tax laws; and here the fiction of "*Mobilia sequuntur personam*" fully applies, as the property is usually drawn or remitted to the owner's domicile for administration and distribution, unless detained at the situs by creditors.<sup>14</sup>

<sup>11</sup> *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330; *In re James*, 144 N. Y. 6, 38 N. E. 961.

<sup>12</sup> *State v. Dalrymple*, *Alvany v. Powell*, and *In re Romaine*, *supra*, are the leading cases.

<sup>13</sup> *People v. Commissioners of Taxes*, 23 N. Y. 224; *People v. Smith*, 88 N. Y. 576; *People v. Gardner*, 51 Barb. 352; *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488; *People v. Barker*, 135 N. Y. 656, 32 N. E. 252.

<sup>14</sup> *Kintzing v. Hutchinson*, 34 Leg. Int. 365; *Allen v. Philadelphia* (148)

Hence, there would seem to be no question, among any of the authorities, that such personal property of a deceased resident, wherever situated, and the real or leasehold estate within the state of his domicile, passing to persons subject to the tax, and whether such personal property be of a tangible or intangible nature, are taxable under these laws. This rule, under the fiction of law, applies both against resident and nonresident legatees or devisees of such a decedent, as to personalty, wherever it be situated.<sup>15</sup>

Hence, stocks of a foreign corporation, held by the ex-

Sav. Fund, 25 Int. Rev. Rec. 171; *Bruce v. Bruce*, 2 Bos. & P. 229, note; *In re Short's Estate*, 16 Pa. St. 66; *McKeen v. Northampton Co.*, 49 Pa. St. 519; and cases cited section 44, *supra*.

<sup>15</sup> *Tyson v. State*, 28 Md. 577; *Mager v. Grima*, 8 How. 490; *Eyre v. Jacob*, 14 Grat. 422; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; *In re Short's Estate*, *supra*; *Orcutt's Appeal*, 97 Pa. St. 184; *Com. v. Smith*, 5 Pa. St. 143; *Alexander's Appeal*, 3 Clark (Pa.) 87; *U. S. v. Hunnewell*, 13 Fed. 617; *Stokes v. Ducroz*, Layton, Leg. and Succ. Duties (7th Ed.) 20; *Chatfield v. Berchtoldt*, 7 Ch. App. 192; *In re Ewin*, 1 Crompt. & J. 151; *Attorney General v. Napier*, 6 Exch. 217; *Forbes v. Steven*, L. R. 10 Eq. 178; *Custance v. Bradshaw*, 4 Hare, 315; *In re Coales' Estate*, 7 Mees. & W. 390; *Arnold v. Arnold*, 2 Mylne & C. 256; *In re Cigala* (1878) 7 Ch. Div. 351; *In re Enston's Will*, 113 N. Y. 181, 21 N. E. 87. See, also, *Cooley, Tax'n* (2d Ed.) 44, 56; *Alvany v. Powell*, 2 Jones, Eq. 51; *State v. Brevard*, Phil. Eq. 141; *Com. v. Brenner*, 2 Leg. Gaz. (Pa.) 413; *People v. Commissioners of Taxes*, 51 Hun, 312, 3 N. Y. Supp. 885. See, also, *In re Line's Estate* (1893) 155 Pa. St. 378, 26 Atl. 728; *In re Stanton's Estate* (1894) 34 Wkly. Notes Cas. 391; *In re Strong* (Aug., 1894) 17 N. J. Law J. 234; *In re Swift* (1893) 137 N. Y. 77, 88, 32 N. E. 1096, affirming (Sup.) 19 N. Y. Supp. 292; *In re Merriam's Estate* (1894) 141 N. Y. 484, 36 N. E. 505; *In re Corning's Estate* (1893; Surr.) 23 N. Y. Supp. 285. In *Dallinger v. Rapello*, 14 Fed. 32, it was held that the personal property of a deceased inhabitant was not taxable within the state, after the appointment of an executor, and before distribution, where the property was not within the state, and neither the executor nor any person in interest had a domicil there. The decision, however, was on the construction of

ecutor of a resident decedent, are to be regarded as part of the estate, subject to the tax. To compute the succession tax on the total personal estate is not imposing a tax on the stocks of foreign corporations constituting a part of the estate.<sup>16</sup>

Notes secured by mortgages of land in another state, and owned by a resident of New York at his death, are within the statutes of that state<sup>17</sup> declaring subject to the legacy taxes "all property that shall pass by will \* \* \* from any person who may die \* \* \* possessed of the same while a resident of this state; and it is immaterial that the notes and mortgages are in the hands of the owner's agent in the state where the land is situated."<sup>18</sup> But where the personal estate of a resident decedent consisted of a share in the estate of a decedent who resided in another state, and was not received by decedent before her death, but came afterwards to the hands of her executors for the purpose of distribution, it is not taxable.<sup>19</sup>

the statute, and not upon the point of state power. See Cooley, Tax'n (2d Ed.) p. 55, note.

<sup>16</sup> In re Merriam's Estate (1894) 141 N. Y. 484, 36 N. E. 505; In re Swift, 137 N. Y. 77, 88, 32 N. E. 1096. These cases overrule In re Thomas (1893) 3 Misc. Rep. 388, 24 N. Y. Supp. 713. See, also, In re Corning's Estate (1893) 3 Misc. Rep. 160, 23 N. Y. Supp. 285; In re Stanton's Estate (1894) 34 Wkly. Notes Cas. 391; Commonwealth's Appeal (Small's Estate) 151 Pa. St. 1, 25 Atl. 25; Weaver's Estate (1895) 12 Lanc. Law Rev. 57; In re Coleman's Estate, 159 Pa. St. 231, 28 Atl. 137; In re Strong, 17 N. J. Law J. (Aug., 1894) 234; Estate of Lines (1893) 155 Pa. St. 378, 26 Atl. 728.

<sup>17</sup> Laws 1885, c. 483, as amended by Laws 1891, c. 215.

<sup>18</sup> In re Corning's Estate (1893) 3 Misc. Rep. 160, 23 N. Y. Supp. 285, citing In re Swift, 137 N. Y. 77, 32 N. E. 1096; In re Bittinger's Estate, 129 Pa. St. 338, 18 Atl. 132.

<sup>19</sup> In re Thomas (1893) 3 Misc. Rep. 388, 24 N. Y. Supp. 713. See In re Phipps (1894) 77 Hun. 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823. Contra, Weaver's Estate (1895) 12 Lanc. Law Rev. 57, 52 Leg. Int. 197.



So the Pennsylvania statute<sup>20</sup> taxes all personal property of a resident decedent, no matter where situated, including debts secured by mortgages upon lands in other states.<sup>21</sup>

Interest in a partnership, actually within the state, consisting of land, stocks, bonds, and accounts, are taxable.<sup>22</sup>

A fund inherited by a nonresident shortly before his death, and paid over to his administrator in Pennsylvania by the administrator of a resident of that state, is subject to the collateral tax. It appeared that the fund had a situs in Pennsylvania and not at the domicile of the owner.<sup>23</sup>

So it is held in New Jersey that personal property of a resident, which at the time of decedent's death was within the jurisdiction of another state, is subject to the collateral inheritance tax imposed by the state of residence, although the will was not proved in the latter state.<sup>24</sup>

And in Pennsylvania, where a resident decedent made a trust deed of certain bonds and stock of foreign corporations to a trustee (corporation) in another state, giving it legal title thereto, but reserving the income to himself for life, with power of revocation, and directing that after his death the property be distributed among certain beneficiaries, it was held that the rule of the domicile applied, and that the property was taxable under the statute.<sup>25</sup>

<sup>20</sup> Laws 1887, p. 79, Appendix, III.

<sup>21</sup> *In re Stanton's Estate* (1894) 34 Wkly. Notes Cas. 391, 15 Pa. Co. Ct. R. 17, 3 Pa. Dist. Ct. 371, and 51 Leg. Int. 172.

<sup>22</sup> *Appeal of Commonwealth (Small's Estate)* 151 Pa. St. 1, 25 Atl. 23; distinguishing *Orcutt's Appeal*, 97 Pa. St. 185.

<sup>23</sup> *In re Weaver's Estate*, 12 Lanc. Law Rev. 57, 52 Leg. Int. 197.

<sup>24</sup> *In re Strong*, 17 N. J. Law J. (Aug., 1894) 234; following *In re Swift*, 137 N. Y. 80, 32 N. E. 1096.

<sup>25</sup> *Estate of Lines* (1893) 155 Pa. St. 378, 26 Atl. 728, 24 Pittsb. Leg. J. (N. S.) 29; citing *Orcutt's Appeal*, 97 Pa. St. 179.

(b) *Real Estate under Doctrine of Equitable Conversion.*<sup>26</sup>

Where the real estate of the decedent is situated in a foreign country, no direct tax under these laws can be imposed. Being beyond the jurisdiction of the state of domicile, such real property cannot be reached under these laws for the purpose of taxation, even though devised to a resident of the taxing state.<sup>27</sup>

Any law in the nature of a direct tax, having this object in view, would, it seems, infringe upon constitutional grounds, and be unenforceable by the state;<sup>28</sup> but it would seem that the state has the power to impose a succession tax upon every citizen of the state who succeeds to either real or personal property, from whatever source received, if it is not in the nature of a direct tax.<sup>29</sup>

One of the most interesting questions arising under these statutes is that concerning the taxation of real estate, foreign or domestic, under the doctrine of an equitable conversion by will, where the will treats it as personalty.<sup>30</sup> The decisions are conflicting as to how far the state can take

<sup>26</sup> See this subject discussed in a valuable note by H. W. Page, Esq., in 32 Am. Law Reg. (N. S.) 472, entitled "Collateral Inheritance Tax-Conversion of Land Outside of State."

<sup>27</sup> *In re Swift*, 137 N. Y. 77, 88, 32 N. E. 1096, affirming 19 N. Y. Supp. 292; *In re Coleman's Estate* (1893) 159 Pa. St. 231, 28 Atl. 137; *Commonwealth's Appeal (Small's Estate)* 151 Pa. St. 1, 25 Atl. 23; *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492; *Lorillard v. People*, 6 Dem. Sur. 268; *Drayton's Appeal*, 61 Pa. St. 172; *Com. v. Coleman*, 52 Pa. St. 468; *Hood's Estate*, 21 Pa. St. 106; *Kintzing v. Hutchinson*, Fed. Cas. No. 7,834; *In re Wolfe*, 19 N. Y. St. Rep. 263; *Estate of Dewey*, N. Y. Law J. Oct. 21, 1889.

<sup>28</sup> *Commonwealth's Appeal (Estate of Bittinger)* 129 Pa. St. 338, 18 Atl. 132, and cases cited in chapter 2, § 15. See *Com. v. Coleman*, 52 Pa. St. 468. But see *Estate of Dewey*, *supra*.

<sup>29</sup> *In re Bittinger's Estate*, *supra*.

<sup>30</sup> See 32 Am. Law Reg. (N. S.) 472, by H. W. Page, Esq.

advantage of this doctrine in order to impose a legacy or succession tax upon the proceeds of such real estate, where it is not taxable *per se* as real estate, or where it is situate beyond the jurisdictional limits of the taxing state.

In England it was said at an early date that equity will not alter the nature of property for the purpose only of subjecting it to fiscal claims, to which at law it was not liable in its existing state.<sup>31</sup> And, in *Forbes v. Steven*,<sup>32</sup> James, L. J., showed his ideas of the doctrine when he said: "It would take a good deal more than I have yet heard to satisfy me that a man can, with the same breath, say effectually in this court, 'give me the money because it is residuary personal estate,' and declare it is not taxable because it is not residuary personal estate." Yet, under the probate duty act, the law regarding partnership has been settled; and real estate, being in the nature of personalty, and subject to conversion with all the other assets, is held liable to duty.<sup>33</sup> And, as regards a British subject, the succession duty has even attached to foreign real estate used in a co-partnership as an asset, a member of which firm was a domiciled Englishman.<sup>34</sup>

In New York the doctrine of equitable conversion is well settled, and a will devising the residue of a testator's property to trustees, with directions to convert it into money, and to divide it among designated legatees, works a con-

<sup>31</sup> *Custance v. Bradshaw* (1845) 4 Hare, 315.

<sup>32</sup> L. R. 10 Eq. 192.

<sup>33</sup> *Attorney General v. Hubbuck*, 10 Q. B. Div. 488; *Waterer v. Waterer*, L. R. 15 Eq. 402; *Cooper v. Cooper*, 26 Wkly. Rep. 785. See *Attorney General v. Dodd* (1894) 2 Q. B. 150.

<sup>34</sup> *Forbes v. Steven*, L. R. 10 Eq. 178. For a discussion of the English cases on the question of the equitable conversion of the real estate into personalty for the purpose of taxation under these acts, see note to *In re Williamson's Estate*, 32 Am. Law Reg. (N. S.) 472, 26 Atl. 246, by H. W. Page, Esq., criticising the rule.

version of realty into personalty, and in construing the will the rules governing personalty are to be applied.<sup>35</sup>

Recently, in that state, the subject of the taxation of foreign real estate belonging to a resident, under the doctrine of equitable conversion by will, has been considered; and it was held, under the act of 1887, that such real estate, although directed to be converted into personalty, was not taxable, because the statute did not intend to tax it, and the doctrine of equitable conversion was also held not applicable to subject it to taxation.<sup>36</sup>

The question was only briefly considered in this case, and no reasons were given by the court, except those stated above. It was raised later in the court of appeals,<sup>37</sup> and was said to be a difficult question, but the court did not discuss it further. The rule has, however, since been followed.

The doctrine is not applicable under the statute for the purpose of making a legacy of money one of real estate, into which it was directed to be invested by the executors for the legatee's benefit.<sup>38</sup>

And a legacy to a church for the purpose of building a new one, or renovating the old, cannot, under the doctrine

<sup>35</sup> *Bowditch v. Ayrault* (N. Y. App.) 33 N. E. 1067; *Foster v. Winfield* (Super. N. Y.) 23 N. Y. Supp. 172; *White v. Howard*, 46 N. Y. 144; *In re Fox's Will*, 52 N. Y. 536; *Power v. Cassidy*, 79 N. Y. 602.

<sup>36</sup> *In re Swift* (1893) 137 N. Y. 77, 32 N. E. 1096; *Id.* (Sup.) 19 N. Y. Supp. 292; *In re Secor* (June 22, 1893) 9 N. Y. Law J. 779. See *In re Coleman's Estate* (1893) 159 Pa. St. 231, 28 Atl. 137; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, 28. These cases practically overrule *In re Wheeler's Estate*, 1 Misc. Rep. 450, 22 N. Y. Supp. 1076, holding such real estate under the doctrine taxable, as against direct heirs, although the act of 1892 (chapter 399, §§ 1, 2) plainly exempts such real estate from taxation.

<sup>37</sup> *In re Curtis*, 142 N. Y. 221, 36 N. E. 887.

<sup>38</sup> *In re Raymond*, N. Y. Law J. Nov. 9, 1894.

of equitable conversion, be considered real estate. It is a legacy of money, and taxable.<sup>39</sup>

It has been held, however, that an infant's share of the proceeds of a partition sale of land is taxable as personal property, under the New York law of 1892,<sup>40</sup> which exempts from taxation property passing to certain lineal heirs, "unless it is personal property of the value of \$10,000 or more, in which case it shall be taxable."<sup>41</sup>

The doctrine in New York conflicts to some extent with that in Pennsylvania, where it is held that, where the will of a decedent directs that real property situated abroad shall be converted into personalty, it may be taxed by the laws of decedent's domicile, as the tax is in reality considered as being imposed upon the proceeds passing under the will.<sup>42</sup> The same rule was followed in a later case,<sup>43</sup> where there was real estate of testator in other states, which he directed his executors to sell, and the proceeds to be divided among persons and objects at the domicile; and it was held that the direction to sell converted the real estate and its proceeds into personalty, and they were liable to taxation.

But there are exceptions to the rule. And where a testator directs that real estate situated in another state shall be sold after the death of his wife, and that the proceeds

<sup>39</sup> *Sherrill v. Christ Church* (1890) 121 N. Y. 701, 25 N. E. 50; reversing 55 Hun, 472, 8 N. Y. Supp. 806, and citing *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, 20 N. E. 864.

<sup>40</sup> Chapter 399, § 2.

<sup>41</sup> *In re Stiger* (Surr.) 28 N. Y. Supp. 163.

<sup>42</sup> *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492, followed in *Re Williamson's Estate* (1893) 153 Pa. St. 508, 26 Atl. 246; *Id.*, 143 Pa. St. 150, 22 Atl. 836. See note to this case by W. H. Page, Esq., in 32 *Am. Law Reg. (N. S.)* 472. See 48 *Leg. Int.* 428; 49 *Leg. Int.* 106; *In re Howard*, 5 *Dem. Sur.* 486; *In re Wheeler's Estate* (Surr.) 22 N. Y. Supp. 1076.

<sup>43</sup> *In re Williamson's Estate*, *supra*; *Mitchell, J.*, dissenting.

thereof shall be invested in mortgages in such state, the proceeds are not subject to taxation in Pennsylvania, even if the interests of the parties in remainder vest in them, at testator's death, as personalty.<sup>44</sup> Ashman, J., said (page 183): "The testator was domiciled in this state at his death, and the real estate which he directed, by his will, to be sold, is situate, part of it in New Jersey, and most of it in Missouri. The direction to sell covered these lands but it was operative only at the death of the widow,—an event which has now happened. If, during her life, the lands retained, as against the commonwealth, their original character, they were beyond the reach of the taxing power of this state.<sup>45</sup> If the direction to sell had been immediate, as in *Re Williamson's Estate*,<sup>46</sup> or, which is the same thing, if the exercise of the power was extended at the discretion of the executor, and in the interest of the estate, for three years after the death, as in *Miller v. Com.*,<sup>47</sup> then, under the ruling in both of those cases, the estate which passed from the testator would be personalty, and would be liable to the tax. In the case in hand, the estate which passed under the will was a freehold, and its situs was beyond the commonwealth; and neither its character nor its situs was possible of change during the life of the first taker."

\* \* \* The fund in *Williamson's Estate* and *Miller v. Com.*, supra, was to be brought within this jurisdiction; and it had become literally, in the words of the act, an estate passing from the testator, within the commonwealth. The direction here is that it shall be withheld from transmission into this commonwealth, and shall be invested in mortgages and real estate in St. Louis. It can hardly be said,

<sup>44</sup> In *re Hale's Estate* (1893) 161 Pa. St. 181, 28 Atl. 1071, 14 Pa. Co. Ct. R. 220, and 3 Pa. Dist. R. 84.

<sup>45</sup> Citing *Com. v. Coleman*, 52 Pa. St. 468.

<sup>46</sup> 153 Pa. St. 521, 26 Atl. 246.

<sup>47</sup> 111 Pa. St. 321, 2 Atl. 492.

in face of this unqualified injunction of the testator, that the fund follows the person of the owner, and, while it is secured upon real estate in Missouri, is nevertheless, by a legal fiction, transferred into Pennsylvania. To accede to this would compel us to hold that the substance of property may be taxed in one state, and its shadow in another,—a species of phantom legislation which, we believe, has not yet been recognized by the courts. \* \* \* It follows from all this that, whether it bears the impress of realty or personalty, the estate is not subject to the imposition of the tax.”<sup>48</sup>

A mere authority to the executors, however, to sell such foreign real estate, without any positive direction to that effect contained in the will, does not warrant the taxing of the proceeds, notwithstanding that the executors bring them within the state, and mix the proceeds with other money belonging to the estate.<sup>49</sup>

The court said:<sup>50</sup> “We must consider the case as if this Minnesota land had been all the estate the testator had, and as if it had been sold under the power, and the proceeds distributed abroad. Surely, the bringing them into this state, and depositing them in the bank account of the executors, along with other funds of the estate, can make no difference. The amount is certain, and they needed no earmark to distinguish them from other money of the testator. In re Hood’s Estate<sup>51</sup> shows clearly that if the property is not liable to tax at the death of the testator, wher-

<sup>48</sup> As to taxation of real property in Pennsylvania as against non-residents, etc., see *In re Coleman’s Estate* (1893) 159 Pa. St. 231, 28 Atl. 137; *In re Small’s Estate*, 151 Pa. St. 1, 25 Atl. 23, 28.

<sup>49</sup> *Drayton’s Appeal*, 61 Pa. St. 172; *Com. v. Coleman*, 52 Pa. St. 468; *In re Hood’s Estate*, 21 Pa. St. 106.

<sup>50</sup> *Drayton’s Appeal*, *supra*.

<sup>51</sup> 21 Pa. St. 106.

ever it is, the bringing of it into the state does not make it so." The domicile of any one is presumed to continue until it is changed by acquiring a domicile elsewhere. No temporary sojourn in a foreign country will effect such change.<sup>52</sup>

So the declaration of a decedent in his will, made five years before the tax was imposed, that he was a resident of New York, is controlling, in the absence of positive proof to the contrary.<sup>53</sup>

Under the acts of congress, it was held that where the testator had abandoned his residence in this country, and taken up a foreign domicile, the legacies provided for in his will were not subject to the tax, but upon the express ground that there was no intention to tax nonresident estates.<sup>54</sup>

But under the English law the estates of English subjects dying abroad, where they intended making their domicile, are liable to the legacy tax, unless there is evidence also showing that they had actually obtained a foreign domicile at the time of death.<sup>55</sup>

And, notwithstanding such change of domicile is effected, in such event certain estates may be, nevertheless, liable to succession duty.<sup>56</sup>

<sup>52</sup> As to what constitutes such change, see *In re Hood's Estate*, 21 Pa. St. 106.

<sup>53</sup> *In re Hughes*, N. Y. Daily Reg. July 27, 1889.

<sup>54</sup> *U. S. v. Morris*, 27 Fed. 341; *U. S. v. Hunnewell*, 13 Fed. 617, and note, page 618; *San Francisco v. Mackey*, 22 Fed. 602.

<sup>55</sup> *Udny v. Udny* (1869) L. R. 1 H. L. Sc. 441; *Attorney General v. Dunn*, 6 Mees. & W. 526; *Attorney General v. Napier*, 6 Exch. 217; *Hamilton v. Dallas*, L. R. 1 Ch. Div. 257; *Attorney General v. Wahlstatt*, 3 Hurl. & C. 374; *In re Tootall's Trust*, L. R. 23 Ch. Div. 532; *In re Capdevielle*, 2 Hurl. & C. 985.

<sup>56</sup> *Attorney General v. Wahlstatt* and *In re Capdevielle*, *supra*.



### § 47. Nonresident Decedents, Their Heirs and Legatees.

(a) *The English Rule, "Mabilia Sequuntur Personam."*

We have already seen<sup>57</sup> that two statutes in England regulate the duty or tax upon gifts, legacies, and successions. While these statutes were evidently meant to, and do, cover almost every conceivable form of transfer, whether inter vivos, or by will or intestacy, curiously enough, both of these enactments—especially the legacy act—have been found to be most incomplete and defective, so far as the liability of the personal property within English territory of nonresident and alien decedents is concerned; and notwithstanding it is conceded, in cases involving such liability, that parliament has the undoubted power to impose these taxes upon the estates of such foreign decedents,<sup>58</sup> yet, by force of a construction placed upon these statutes under the fiction of law, the intention on the part of the legislature to tax such estates under the legacy act has been denied by all the judges in the house of lords.<sup>59</sup>

On the other hand, under the succession act, while, with respect to simple legacies, the same rule has been adopted, personal estates held in trust in England by English trustees, subject to local courts, have been taxed, notwithstanding all the parties were aliens.<sup>60</sup>

<sup>57</sup> Chapter 1.

<sup>58</sup> *Wallace v. Attorney General*, L. R. 1 Ch. App. 1, per Lord Chancellor Cranworth; *In re Badart*, L. R. 10 Eq. 288.

<sup>59</sup> *Thompson v. Advocate General*, 12 Clark & F. 1; overruling *Attorney General v. Cockerill*, 1 Price, 165; *Attorney General v. Beetson*, 7 Price, 560. And see these cases criticised in *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Alvany v. Powell*, 2 Jones, Eq. 51; *In re Clark's Estate (Surr.)* 9 N. Y. Supp. 444.

<sup>60</sup> *In re Lovelace*, 4 De Gex & J. 340; *In re Wallop's Trust*, 1 De Gex, J. & S. 656.

The result of a construction which thus exempted foreign estates in England from the tax under the legacy act, arising from a strict adherence to the maxim, "*Mobilia sequuntur personam*," and the relaxation of the rule under the succession act, has obviously been to cause confusion and a want of harmony among the cases under these statutes, and, as we shall hereafter see, has provoked judicial criticism both in that country<sup>61</sup> and in America, where, in many instances, these cases have been substantially rejected as authorities.<sup>62</sup>

Under the legacy act, it was originally held that legacies left by a person domiciled in a foreign country, where the will was proved and administration of the estate had, if remitted to England, to the legatees, were liable to the tax, upon the theory that there was a new administration there.<sup>63</sup>

The principle announced in the earlier cases under the legacy acts, however, was not strictly followed where the assets of a foreign estate were brought into the kingdom after decedent's death, to pay legatees, or for any other purpose; for the court held that it was not liable, upon the

<sup>61</sup> *Lyall v. Lyall* (1872) L. R. 15 Eq. 1; criticising *Wallace v. Attorney General*, *supra*.

<sup>62</sup> *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Alvany v. Powell*, 2 Jones, Eq. 51; *In re Clark's Estate* (Surr.) 9 N. Y. Supp. 444; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; 48 Phila. Leg. Int. 265. But see *In re James*, 144 N. Y. 6, 38 N. E. 961; *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330; *In re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517. See *In re Enston*, 113 N. Y. 183, 21 N. E. 87; *Pullman's Palace Car Co. v. Pennsylvania* (1891) 141 U. S. 18, 22, 11 Sup. Ct. 876, affirming 107 Pa. St. 156.

<sup>63</sup> *Attorney General v. Cockerill*, 1 Price, 165; *Attorney General v. Beetson*, 7 Price, 819. See *In re Alexander's Estate*, 3 Pa. Law J. R. (Clark) 87, \*448; *In re Romaine*, *supra*. But probate duty, it was held, would not have been payable. *Attorney General v. Hope* (1830) 1 Crompt., M. & R. 520; *Attorney General v. Napier* (1851) 6 Exch. 217; *Forbes v. Steven*, L. R. 10 Eq. 186.

grounds stated by Lord Cottinham,—that the act referred merely to persons and wills and personal estates within the limits of the kingdom.<sup>64</sup>

None of these cases made the distinction between domicile, residence, or situs<sup>65</sup> until 1830, when<sup>66</sup> the doctrine was first broached that the true criterion whether the parties were liable to legacy duty depended upon the fact whether the testator, at the time of his death, was domiciled in England, and the maxim that the personal property followed the person of the owner was adopted.<sup>67</sup>

Finally, in 1845, the house of lords declared, applying this maxim in its full force, that an English subject domiciled in a British colony, who was at the time entitled to a debt due in Scotland, and whose administrators took out letters in that country, collected the debt, and paid the legatees with the proceeds in the latter country, was not liable to legacy duty.<sup>68</sup>

All the judges agreed that the statute, notwithstanding its general words, “every legacy given by any will or testamentary instrument of any person,” was limited, and did not extend to the will of any person who at the time of his death was domiciled out of Great Britain, whether the assets were locally situate within England or not, and that the debt only formed part of the personal property of the testator, and that the liability to the duty did not depend on the executor proving the will in England, nor upon his administration there, but the question, according to the

<sup>64</sup> *Arnold v. Arnold*, 2 Mylne & C. 270; *Attorney General v. Forbes*, 2 Clark & F. 48; *Attorney General v. Jackson*, 8 Bligh, 15. But see *Attorney General v. Campbell* (1872) L. R. 5 H. L. 524.

<sup>65</sup> *Attorney General v. Napier*, 6 Exch. 217.

<sup>66</sup> *In re Ewing*, 1 Crompt. & J. 151; following *Bruce v. Bruce*, 2 Bos. & P. 229. See, also, *In re Bruce*, 2 Crompt. & J. 436.

<sup>67</sup> *Attorney General v. Napier*, *supra*; *Thomson v. Advocate General*, 13 Sim. 153, 12 Clark & F. 1.

<sup>68</sup> *Thomson v. Advocate General*, 12 Clark & F. 1.

lord chancellor, turned upon the meaning of the statute limiting its operation to Great Britain.<sup>69</sup>

So far as this doctrine applied to a British subject, Lord Brougham,<sup>70</sup> who seemed to have entertained doubts upon the question, said, "I believe that if the chancellor of the exchequer, who introduced this bill into parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British-born subject, and had merely acquired a foreign domicile"; and he observed that the doctrine of domicile was of recent growth, and that neither the legislature nor the judges thought much of it.

As a necessary consequence or converse of this rule, it was held that where a testator died domiciled in England, though residing temporarily abroad at the time of death, the duty was payable on his personal estate, though situated abroad.<sup>71</sup>

So the legacy duty was held payable upon the share of a deceased partner—a domiciled Englishman—in the proceeds of freehold property abroad, used there for the purposes of the partnership, and forming an asset thereof, upon the ground that, as between the partners, the real property was, in law, considered as personalty.<sup>72</sup>

The same rule was subsequently considered and applied<sup>73</sup> with reference to the succession duty,<sup>74</sup> where there were

<sup>69</sup> 12 Clark & F. 20.

<sup>70</sup> 12 Clark & F. 28.

<sup>71</sup> Attorney General v. Napier, 6 Exch. 217; Lord Cranworth, in Wallace v. Attorney General, L. R. 1 Ch. App. 1. See, also, Attorney General v. Dunn (1840) 6 Mees. & W. 526; In re Coales (1841) 7 Mees. & W. 390; Arnold v. Arnold, 2 Mylne & C. 256.

<sup>72</sup> Forbes v. Steven (1870) L. R. 10 Eq. 178; Custance v. Bradshaw, 4 Hare, 315.

<sup>73</sup> Wallace v. Attorney General, supra.

<sup>74</sup> 16 & 17 Vict. c. 51.

legacies payable under the will of a foreigner to legatees in England, the estate there consisting both of real and personal property in the hands of English executors. Lord Chancellor Cranworth, in holding that there was no intention to tax such estate, and referring to certain practical difficulties in the way of such taxation, said: "The statute was passed only about eight years after the decision of the house of lords in *Thompson v. Advocate General*,<sup>75</sup> and when the nonliability to legacy duty of legatees under the will of persons not domiciled in this country had been fully established after having for a long time previously given rise to much discussion. I can hardly think that the legislature intended by a side wind, as it were, and without any preamble of its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different courts, had established the rights of persons claiming as legatees under foreign wills. Parliament has, no doubt, the power of taxing the successions of foreigners to their personal property in this country; but I can hardly think that we ought to presume such an intention, unless it is clearly stated."<sup>76</sup>

But what would seem to be a wide departure from the rule of domicile, as originally declared, and as conflicting with this case, had been previously made in several decisions, and the court was compelled to declare that its decision did not conflict with these cases.<sup>77</sup>

Hence, under the succession act, an exception was estab-

<sup>75</sup> 12 Clark & F. 1.

<sup>76</sup> To same effect, *In re Enston's Will*, 113 N. Y., at page 181. 21 N. E. 87, and *In re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36, both of which were decided under the New York act of 1885; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759. See *In re James*, 144 N. Y. 6, 38 N. E. 961; *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330.

<sup>77</sup> See *In re Lovelace* (1870) 4 De Gex & J. 340; *In re Wallop's Trust* (1864) 1 De Gex, J. & S. 656.

lished, as regards a class of cases in which personal property was held in trust, or under marriage settlements, by English trustees, subject to English courts, notwithstanding, in some instances, all the beneficiaries were aliens residing or dying abroad, the mere legal title being vested in the trustees. And it was held that the property in England was liable to the succession tax, though not to the legacy duty.<sup>78</sup>

In *Re Cigala*, where the exception was followed, Jessel, M. R., said: "On what ground is it contended that no duty is payable? It is said that the English government does not tax foreigners, but only Englishmen. As a proposition of law, I am not prepared to assent to that. There are very many cases in which the English government does tax foreigners. We have a very familiar instance in the case of a foreigner with a British domicile dying intestate as to personal estate, leaving foreign next of kin, or dying testate as to personal property, and giving the whole of it to foreigners. There the next of kin or residuary legatee pays duty out of the property, though the personal property in question may be situate abroad, the right to the property being the right of the testator or intestate; for, according to the rule of law, '*Mobilia sequuntur personam*,' the right to the property is a right governed by the domicile of the testator or intestate. In that case it is quite clear that a foreigner is taxed by the English law, though the property is actually situated abroad; and therefore it is not true, as a universal rule, that English legislation does not tax foreigners."

<sup>78</sup> In *re Lovelace*, *supra*; In *re Wallop's Trust*, *supra*. See, also, In *re Cigala*, 7 Ch. Div. 356; *Attorney General v. Fitzjohn* (1857) 2 Hurl. & N. 465; *Lyall v. Lyall* (1872) L. R. 15 Eq. 1, criticising *Wallace v. Attorney General*, L. R. 1 Ch. App. 1; In *re Badart*, L. R. 10 Eq. 288. See, also, *Attorney General v. Campbell* (1872) L. R. 5 H. L. 524; In *re Smith's Will* (1864) 12 Wkly. Rep. 933.

The doctrine thus established under the succession act, though more in accordance with reason and justice, has been criticised as being in conflict with the rule announced under the legacy act. "I must state," says Romilly, M. R.,<sup>79</sup> "that it appears to me that the distinction drawn between the two statutes is extremely thin, and that the arguments against legacy duty, as stated in *Thompson against Advocate General*,<sup>80</sup> apply with equal force to the words of this statute, as regards, at all events, property locally situated abroad; and it is to be remembered that that case was not heard *ex parte*, but was twice argued before the house of lords, and that it was not only the opinion of that tribunal, consisting of Lords Lyndhurst, Brougham, and Campbell, but it was so after taking the opinion of Chief Justice Tindal and seven other judges."

And recently it has been adjudged that the personal property bequeathed by a foreigner not domiciled in England, while not in the first instance liable to legacy or succession duty, becomes liable where the executor directed to collect foreign property invested in England has discharged the duty imposed upon him, and any subsequent devolution of it is liable to succession duty, though the party on whom it may devolve be, like the testator, domiciled abroad, and that the liability to legacy duty of real estate in England is not affected by domicile.<sup>81</sup>

And the rule has recently been strongly reiterated in England, under the legacy act, by Mr. Justice Chitty, that the question of liability to the duty depends solely upon that of domicile of the testator or intestate at the time of death, and that the circumstance that the personal prop-

<sup>79</sup> *Lyall v. Lyall* (1872) L. R. 15 Eq. 1.

<sup>80</sup> 12 Clark & F. 1.

<sup>81</sup> *Chatfield v. Berchtoldt*, L. R. 7 Ch. App. 192; *Attorney General v. Campbell* (1872) L. R. 5 H. L. 524. See, also, *In re Badart*, L. R. 10 Eq. 288.

erty was locally situate in that country, or sent there to be paid to legatees, was immaterial, and that the fact that the will was not proved in England made no difference when the domicile was English.<sup>82</sup>

So English subjects dying abroad are liable to the legacy tax, unless it clearly appears that they had an actual domicile in a foreign state at the time of death.<sup>83</sup>

And a foreigner acquiring a domicile in England becomes liable to the duty.<sup>84</sup>

Under the succession act, the word "property" has been held to include stocks and shares in foreign governments transferable abroad, the certificates for which were merely held in England by trustees.<sup>85</sup>

Under the probate duty act, such foreign bonds and securities as are marketable commodities in England, or pass by delivery from hand to hand, are liable to duty, but the rule is different where the stocks are registered in foreign countries.<sup>86</sup>

(b) *Application of the Rule in America.*

We have already discussed the question as to the power of the state to impose succession or legacy taxes upon property within its jurisdiction passing by will or intestate

<sup>82</sup> *In re Tootal's Trusts*, 23 Ch. Div. 532. See *In re Strong* (Aug., 1894) 17 N. J. Law J. 234.

<sup>83</sup> *Udny v. Udny* (1869) L. R. 1 H. L. Sc. 441; *Attorney General v. Dunn*, 6 Mees. & W. 526; *Attorney General v. Napier*, 6 Exch. 217; *Attorney General v. Wahlstatt*, 3 Hurl. & C. 374; *In re Capdevielle*, 2 Hurl. & C. 985; *In re Tootal's Trusts*, 23 Ch. Div. 532.

<sup>84</sup> As to what facts are sufficient to show a change of domicile, see cases cited *supra* and *Hamilton v. Dallas*, 1 Ch. Div. 257.

<sup>85</sup> *In re Cigala*, 7 Ch. Div. 356. *Contra*, *In re Enston*, 113 N. Y. 181, 21 N. E. 87; *Orcutt's Appeal*, 97 Pa. St. 185. See *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; *In re James*, 144 N. Y. 6, 38 N. E. 961.

<sup>86</sup> *Attorney General v. Bouwens*, 4 Mees. & W. 171.



law.<sup>87</sup> And, while the administration and distribution of the personal estate of a nonresident decedent are regulated by the law of the owner's domicile, in this country the maxim of "*Mobilia sequuntur personam*" has not been adopted or applied, in its full force, as against the state, upon questions of taxation; in fact, in some cases it has been entirely rejected, as wholly inapplicable.

In some states this result has been reached either by a construction placed upon the statutes on grounds of public policy, favoring equality, and to prevent unjust discrimination between estates of resident and nonresident decedents, and in others by express legislation, and the tax has been imposed upon both the real and personal property, tangible and intangible,<sup>88</sup> of nonresident or alien decedents actually within the taxing state at the time of death, whether or not there be legatees or heirs within the state. In such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the law of the taxing state, in reaching which result the courts have leaned towards the actual or real situs of property, having a visible and tangible existence, rather than to the mere domicile of the owner.

Such would seem to be the law of Maryland, Maine, North

<sup>87</sup> See chapter 2, § 23; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Wallace v. Attorney General*, 1 Ch. App. 1; *Alvany v. Powell*, 2 Jones, Eq. 51; *In re Enston*, 113 N. Y. 184, 21 N. E. 87; *In re McPherson*, 104 N. Y. 316, 10 N. E. 685; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; *In re James*, 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351, and 6 Misc. Rep. 206, 27 N. Y. Supp. 288; *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23. See note to 32 Am. Law Reg. (N. S.) 365, and cases cited.

<sup>88</sup> See Appendix IV.-VII., statutes of Connecticut, Maine, Massachusetts, and Ohio.

Carolina, New York, Connecticut, Massachusetts, and Ohio.<sup>89</sup>

In Connecticut the tax, under a very comprehensive statute, is expressly applied to tangible and intangible property.<sup>90</sup>

The state has power to give tangible personal property a special situs for the purpose of taxation.<sup>91</sup>

In North Carolina the question was early considered under a statute providing for a tax upon the descent or bequest of real estate and personal property passing to stran-

<sup>89</sup> Real and leasehold estate in England is taxed irrespective of domicile. *Chatfield v. Berchtoldt*, 7 Ch. App. 192.

<sup>90</sup> Pub. Laws Conn. 1889, c. 180, Appendix VII. No decision seems to have been made as yet construing this statute. The same provisions are contained in the statutes of Massachusetts, Maine, and Ohio. *Alvany v. Powell*, 2 Jones, Eq. 51; *State v. Brevard*, Phil. Eq. 141; *State v. Brim*, 4 Jones, Eq. 301; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Enston's Will*, 113 N. Y. 183, 21 N. E. 87; *In re Vinot (Surr.)* 7 N. Y. Supp. 517; *In re Clark (Surr.)* 9 N. Y. Supp. 444; *In re Romaine*, 127 N. Y. 80-88, 27 N. E. 759. See, also, *In re Duckworth (July 3, 1891)* 5 N. Y. Law J. 864; *In re Morejon*, Id. 864; *In re Boudon (March 1, 1892)* 6 N. Y. Law J. 1322. Regarding stocks and bonds of foreign corporations belonging to nonresident decedents, see *In re James (1894)* 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351; *In re Thomas*, 3 Misc. Rep. 388, 24 N. Y. Supp. 713; *In re Corning's Estate*, 3 Misc. Rep. 160, 23 N. Y. Supp. 285; *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330; Laws N. Y. 1887, c. 713, as amending Laws 1885, c. 483, Appendix, I. See, also, an article by E. H. Blanc, Esq., in 45 Alb. Law J. April 16, 1892, p. 331, entitled "Collateral Inheritance Tax in Connection with Transfer of Stocks and Loans by Foreign Executors and Administrators," reviewing the law of New York.

<sup>91</sup> *Cooley*, Tax'n (2d Ed.) 23; citing *American Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Mayor, etc., of Baltimore v. Baltimore City Passenger R. Co.*, 57 Md. 31.

gers or collateral kindred. In that case<sup>92</sup> the decedent was a foreigner, and died abroad intestate, leaving property in the state. The authorities under the English legacy act were considered and rejected, and it was held that the principle by which a distinction was made between personal property and real estate, so that in regard to the former a construction depending upon the domicile of the owner was adopted, was based upon a fiction that had no application to questions of revenue, but merely applied to the distribution of the personal estates of deceased persons, and it was claimed that it never had any application where the rights of creditors were concerned.<sup>93</sup>

Pearson, J., said:<sup>94</sup> "The notion upon which the principle of the domicile is based—that personal property attends the person, and is where the owner lives—is a mere fiction, and its very restricted application rests upon the comity of nations; but in collecting debts and taxes we must proceed upon the fact, and consider the property as being where it actually is. In other words, the situs of the property must be the governing principle."<sup>95</sup>

<sup>92</sup> *Alvany v. Powell* (1854) *supra*; criticising *Thomson v. Advocate General*, 12 Clark & F. 1, and other English cases.

<sup>93</sup> Story, *Conf. Law*, 354; *Moye v. May*, 8 Ired. Rq. 131.

<sup>94</sup> 2 Jones, Eq. 57, *supra*.

<sup>95</sup> That the fiction is simply based on considerations of comity, see *Catlin v. Hull*, 21 Vt. 158, approved in *Hoyt v. Commissioners*, 23 N. Y. 232; *Whart. Priv. Int. Law*, §§ 11, 13-297; *Green v. Van Buskirk*, 7 Wall. 150; *Hervey v. Locomotive Works*, 93 U. S. 664; *Lewis v. Woodford*, 58 Tenn. 25; *Birtwhistle v. Vardill*, 5 Barn. & C. 438-451. See the whole question discussed in *Re Romaine*, 127 N. Y. 80, 27 N. E. 759; 48 Phila. Leg. Int. 265; criticised in *Alb. Law. J. Dec. 12*, 1891, p. 478. See *Alb. Law. J. April 16*, 1892, p. 331. See *In re James*, 144 N. Y. 6, 38 N. E. 961; *Id.*, 77 Hun, 213, 28 N. Y. Supp. 351; *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823 (no opinion).

Precisely the same views have been announced in New York, under general tax laws.<sup>96</sup>

So the question has been considered under the Maryland statute,<sup>97</sup> with reference to the liability of a nonresident decedent, who at the time of his death owned certain stocks, bonds, and cash, proceeds of the estate of his deceased brother in that state, and whose legatee—a stranger to the blood—resided outside of the state. McSherry, J., said: “No reason has been assigned, or can be suggested, why the broad language of the statute, and the evident design of the legislature, should be so narrowed and restricted as to exempt from this tax the estate of a nonresident actually here, notwithstanding that same property may, for other purposes be treated as constructively elsewhere. If we adopt the view insisted on by the appellees, it will result in a discrimination in favor of nonresidents and against our own citizens,—a discrimination, too, which the legislature certainly never intended to make, and for which no warrant can be found in the plain letter of the statute. In permitting property within the state, on the death of its owner, to pass by devise, or descent, or distribution, the legislature has seen fit, where strangers or collateral kindred received it, to exact, as the condition upon which that privilege is granted, the tax in question. The imposition and collection of the tax, therefore, cannot depend upon the mere incidental residence of the owner.”<sup>98</sup>

The court distinguished the English cases upon the ground that there was no intention, as declared in those

<sup>96</sup> Hoyt v. Commissioners, *supra*; Graham v. Bank, 84 N. Y. 400. See People v. Coleman, 119 N. Y. 139, 23 N. E. 488; People v. Barker, 135 N. Y. 656, 32 N. E. 252.

<sup>97</sup> State v. Dalrymple, 70 Md. 294, 17 Atl. 82.

<sup>98</sup> And see opinion of Woodward, C. J., in Foreign Bond Tax Cases (Pa. Sup. Ct.) 15 Wall. 305, and cases cited *supra*.

cases, on the part of the legislature, to impose the tax on the estates of alien or nonresident decedents.<sup>99</sup>

And the same criticism applies to other cases decided under these statutes,—that there was no intention to tax such nonresident property, and the result in such cases will be found to be predicated solely upon this ground, and the fiction of law thus held applicable.<sup>100</sup>

So the treaty of France with the United States does not relieve citizens of France leaving property here at their death from the New York inheritance tax. The treaty of 1853 provides: "In all states of the Union whose existing

<sup>99</sup> Citing and reviewing *Citizens' Nat. Bank v. Sharp*, 53 Md. 521; *Orcutt's Appeal*, 97 Pa. St. 179; *Attorney General v. Hope*, 1 Cramp., M. & R. 530; *Attorney General v. Cockerell*, 1 Price, 165; *Attorney General v. Beetson*, 7 Price, 560; *Thomson v. Advocate General*, 12 Clark & F. 1; *Wallace v. Attorney General*, L. R. 1 Ch. App. 1.

<sup>100</sup> *U. S. v. Hunnewell*, 13 Fed. 617; *U. S. v. Morris*, 27 Fed. 341. See *Com. v. Chesapeake & O. R. Co.*, 27 Grat. 354; *Orcutt's Appeal*, 97 Pa. St. 185; *Del Busto's Estate*, 23 Wkly. Notes Cas. 111; *In re Bacon's Estate*, 3 Del. Co. Rep. 603; *In re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36; *In re Enston's Will*, 113 N. Y. 181, 21 N. E. 87, where *Andrews, J.*, said that "the fiction must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent." Notwithstanding the ruling in *Re Romaine*, 127 N. Y. 80, 27 N. E. 759, the fiction has been applied to stocks and bonds of foreign corporations within the state belonging to a deceased nonresident, the court holding that, there being no intention in the act of 1887 (chapter 713) to tax these securities, the fiction prevailed, and they were presumed to be at the domicile of the owner. *In re James* (1894) 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351; distinguishing *In re Romaine*, supra. See elaborate article on the subject in *Alb. Law J.* April 16, 1892, p. 331. This would seem to overrule *In re Duckworth* (July 3, 1891) 5 N. Y. Law J. 864; *In re Morejon* (July 31, 1891) *Id.*; *In re Bondon* (March 1, 1892) 6 N. Y. Law J. 1322. See, also, *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823, on opinion below. But see *Hoyt v. Commissioners of Taxes*, 23 N. Y. 232, and cases supra, page 170.

laws permit it, so long as, and to the same extent as, the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, \* \* \* by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subject to taxes on transfer, inheritance or any others, different from those paid by the latter, or to taxes which shall not be equally imposed.”<sup>101</sup>

(c) *The Rule as Applied to Tangible and Intangible Property.*

While the fiction has not been followed in some states, upon grounds of public policy, and has been overthrown in others by statute, it becomes important to notice the distinction which has been made in this country—but which does not seem to exist in England—between tangible and intangible personal property, because out of this distinction has arisen the main conflict and difference in some of the states, under these laws, as to the taxability of what is often termed purely intangible personal property, such as bonds, certificates of stock, notes, mortgages, debts, and the like. In Connecticut, we have seen, the statute expressly includes both tangible and intangible property, but no decision seems to have been made construing this provision.<sup>102</sup>

The same provision is also contained in the statutes of Massachusetts, Ohio, and Maine.<sup>103</sup>

<sup>101</sup> In re Bordon (March 1, 1892) 6 N. Y. Law J. 1322.

<sup>102</sup> Pub. Laws Conn. 1889, c. 180, Appendix, VII. The state has power to impose a tax upon a debt due from a resident of another state to a citizen of the taxing state, although the debt is secured by a mortgage upon lands in the state where the debtor resides. *Kirkland v. Hotchkiss*, 100 U. S. 498.

<sup>103</sup> See statutes, Appendix, IV.—VI.

It is not always easy to determine what comes within the definition of the terms "tangible" and "intangible."<sup>104</sup>

In England, under the succession act, the word "property" includes the shares of stocks of foreign governments and

<sup>104</sup> We give a few cases defining what has been considered tangible and intangible property under legacy and general tax laws where nonresident decedents are concerned:

(a) Intangible: Debts, i. e. mortgages, railroad bonds, certificates of stock, *Foreign Bond Tax Cases*, 15 Wall. 300, 324; *Kirkland v. Hotchkiss*, 100 U. S. 498; *San Francisco v. Mackey*, 22 Fed. 602; *Com. v. Chesapeake & O. R. Co.*, 27 Grat. 354; *Goldgart v. People*, 106 Ill. 25; *Latrobe v. City of Baltimore*, 19 Md. 13; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; bonds and certificates of stock in foreign corporations, *In re Enston's Will*, 113 N. Y. 181, 21 N. E. 87; *In re James* (1894) 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351, distinguishing *In re Romaine* (1891) 127 N. Y. 88, 27 N. E. 759; land directed to be converted into money and distributed, *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137; *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111; *In re Bacon's Estate*, 3 Del. Co. Rep. 603; *Commonwealth's Appeal*, 11 Wkly. Notes Cas. 492; *Kintzing v. Hutchinson*, 34 Leg. Int. 368; government and state bonds and county stock, *Orcutt's Appeal*, 97 Pa. St. 185; *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111; *Commonwealth's Appeal*, 11 Wkly. Notes Cas. 494; *In re Alexander's Estate*, 3 Pa. Law J. B. (Clark) 87, \*448; chose in action—right to a sum of money or legacy—given by will of a resident to a nonresident decedent not property within the state, *In re Phipps* (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823, mem.

(b) Tangible property: Debt owing resident of taxing state, *Kirkland v. Hotchkiss*, 100 U. S. 498; earnings set apart to pay interest, *Michigan Cent. R. Co. v. Collector*, 100 U. S. 595; *U. S. v. Erie Ry. Co.*, 106 U. S. 327, 1 Sup. Ct. 223; *Com. v. Chesapeake & O. R. Co.*, 27 Grat. 344; bonds, certificates of stock, and money, *American Coal Co. v. Commissioners of Allegany Co.*, 59 Md. 185; *City of Baltimore v. Baltimore Passenger R. Co.*, 57 Md. 31. See *Catlin v. Hull*, 21 Vt. 158, and case cited *supra*, p. 169; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Romaine*, *supra*; *Laws N. Y. 1892 c. 399*, § 9; *In re Duckworth* (July 3, 1891) 5 N. Y. Law J. 864; *In re Morejon, Id.*; government, state, and municipal bonds, etc., *Foreign Bond Tax*

corporations within the kingdom which are transferable abroad.<sup>105</sup>

Many of the statutes, by express provision, include the transfer of stocks by foreign executors. Such a statute is enforced in Pennsylvania,<sup>106</sup> but a similar provision was held unenforceable in New York, under the act of 1885.<sup>107</sup>

As we have seen, upon grounds of public policy, that the taxing state ought not to discriminate against its own citizens, in favor of nonresidents, and in some states, by express enactment, both tangible and intangible property within the state have been held liable to this tax; and so, under general tax laws, taxes have been imposed where such intangible property, such as bonds, stocks, mortgages, and other choses in action, was actually within the taxing state at the time of death, in the hands of an administra-

Cases, 15 Wall. 324; *In re Cigala*, 7 Ch. Div. 356; *In re Ewing*, 1 Crompt. & J. 151; bank and other notes, *Foreign Bond Tax Cases*, 15 Wall. 324; *Osgood v. Maguire*, 61 N. Y. 529; interest of a non-resident deceased partner in a copartnership actually within the state, consisting of land, stocks, bonds, and accounts, *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, 28; *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137; mortgages upon lands, *In re Romaine*, *supra*; *In re Corning's Estate* (Surr.) 23 N. Y. Supp. 285.

<sup>105</sup> Per Jessel, M. R., in *Re Cigala* (1878) 7 Ch. Div. 351. See *Attorney General v. Bouwens' Settlement Trusts*, 4 Mees. & W. 171. But in *Re Enston's Will*, 113 N. Y. 181, 21 N. E. 87, where the maxim was applied, the court said: "The certificates are in no general sense property. They simply represent interest in the corporations," etc. *In re James*, 144 N. Y. 6, 38 N. E. 961; *Orcutt's Appeal*, 97 Pa. St. 179. See 45 Alb. Law J. April 16, 1892, p. 331.

<sup>106</sup> Scott, *Intest. Laws* (Pa., 1871) p. 547. *Contra*, *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834.

<sup>107</sup> *In re Enston*, 113 N. Y. 180, 21 N. E. 87. Under Act 1887, c. 713, § 11, and Laws 1892, c. 399, § 9, such provision would now seem to be unenforceable. *In re Romaine* (1891) 127 N. Y. 86, 27 N. E. 759. See the question discussed in 45 Alb. Law J. April 16, 1892, p. 331. See, also, *In re Stacey* (May 20, 1892) 7 N. Y. Law J. 478.



tor or executor with ancillary letters, or where such property was in the hands of a mere agent for collection.<sup>108</sup>

The contrary view of this subject, which is entitled to much consideration, is taken in Pennsylvania; but even in that state the maxim is apparently restricted to intangible

<sup>108</sup> *State v. St. Louis Co.*, 47 Mo. 594; *Catlin v. Hull*, 21 Vt. 152, cited and approved in *Hoyt v. Commissioners*, 23 N. Y. 224; *People v. Gardner*, 51 Barb. 352; *Osgood v. Maguire*, 61 N. Y. 529; *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Clark (Surr.)* 9 N. Y. Supp. 444; *In re Romaine*, 127 N. Y. 80-88, 27 N. E. 759; *In re Vinot (Surr.)* 7 N. Y. Supp. 517; *In re Cigala*, 7 Ch. Div. 351. But see, regarding stocks and bonds of foreign corporations and debts due nonresidents, *In re Enston*, 113 N. Y. 181, 21 N. E. 87; *In re James* (1894) 144 N. Y. 6, 38 N. E. 961; *Id.*, 77 Hun, 211, 28 N. Y. Supp. 351; *In re Phipps* (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823 (no opinion); *San Francisco v. Mackey*, 22 Fed. 602; *Foreign-Held Bond Tax Cases*, 15 Wall. 300; *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834; *Allen v. Philadelphia Sav. Fund* (1879) 7 Reporter, 775, 25 Int. Rev. Rec. 171, Fed. Cas. No. 234; *Orcutt's Appeal*, 97 Pa. St. 179; *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111. In the *Foreign-Held Bond Tax Cases* (1872) 15 Wall. 300, it was held by a bare majority of the supreme court (Clifford, Miller, Davis, and Hunt, JJ., dissenting) that the state of Pennsylvania had no power to enforce a property tax upon mere interest—a debt—due from a railroad company to bondholders residing abroad, where the bonds were, notwithstanding the bonds were secured by mortgage upon property within the state, upon the ground that the interest was a mere debt and intangible; but it is clear from the prevailing opinion that, had the bonds been within the state “separated from the possession of the owners” (page 342), the tax would have been upheld. See this case distinguished in *New York, L. E. & W. R. Co. v. Pennsylvania* (1893) 153 U. S. 646, 647, 14 Sup. Ct. 952. In *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488, it was held that personal property belonging to a nonresident, in the actual possession of a trustee residing in another state, was not liable to property tax in New York, although two trustees resided there. Such property would have been taxable if within the state. *People v. Barker*, 135 N. Y. 656, 32 N. E. 252.

property, and personal property of a tangible nature is subject to taxation under the law. The position seems to be somewhat inconsistent,<sup>109</sup> as, by express provision of the statute, it is made applicable to transfers of shares of stock within the state by foreign executors.<sup>110</sup>

In *Orcutt's Appeal*, where decedent (a foreigner) died testate, it was said that the act was intended to embrace only personal property of a tangible nature actually situated or used for business purposes within the commonwealth, and not to mere certificates of indebtedness, such as government bonds, whose situs necessarily followed the domicile of the owner. "By the very words of the act," said the court, "the tax is not only limited to such estates as have a situs within the commonwealth, and also pass to collateral heirs or legatees, but it is further restricted in defining the mode in which they shall pass, viz. 'estates being within this commonwealth and passing from any person either by will or under the intestate laws thereof.' It is clear, therefore, that estates not passing by a will that is operative within the state, or under the intestate laws thereof, \* \* \* are not within the purview of the act. Devolution, either under the intestate laws of the commonwealth, or under a properly executed will, is clearly made a condition of liability to the tax."

The court conceded, however, that the will in that case was "sufficient to pass personal property" in the state. It was further said that it did not appear whether any part

<sup>109</sup> See *Orcutt's Appeal*, 97 Pa. St. 185, 186, distinguished and restricted in *Re Romaine*, 127 N. Y. 80-86, 27 N. E. 759; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23; 32 Am. Law Reg. (N. S.) 365, and note.

<sup>110</sup> *Scott, Intest. Laws* (Pa., 1871) p. 547. *Contra*, *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834. See *In re Enston's Will*, 113 N. Y. 180, 21 N. E. 87; *Alb. Law J.* April 16, 1892, p. 331, and cases *supra*.

of the fund would go to the collaterals until after final administration and distribution of the estate.

This rule has been followed in that state as to bonds and other securities, with the extreme result of exempting, not only government bonds, but bonds and stocks issued under the laws of the state, and actually within the state.<sup>111</sup>

Hence, bonds belonging to a nonresident decedent, but within the state, in an agent's hands, at the time of death, are not liable.<sup>112</sup>

So mortgages upon real estate in the state, held as collateral to bonds owned by a decedent domiciled in another state, are not liable.<sup>113</sup>

An interesting question recently arose in Coleman's Estate, where decedent, a nonresident, owned lands in Pennsylvania, and directed his executors to "convert the same into money, and apply the proceeds" to the payment of legacies to collateral heirs. It was held that the proceeds of such lands were not liable to taxation in that state.<sup>114</sup>

The court (Hawkins, P. J.) said:

"The solution of the question involved in this case turns mainly upon the application of the maxim that the situs

<sup>111</sup> *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111; *Commonwealth's Appeal* (Pa. Sup.) 11 Wkly. Notes Cas. 494; *Bacon's Estate*, 3 Del. Co. Rep. 603; *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834. See *Com. v. Smith*, 5 Pa. St. 142; *In re Alexander's Estate*, 4 Pa. Law J. R. (Clark) 87, \*448; *Citizens' Nat. Bank v. Sharp*, 53 Md. 531; *In re Short's Estate*, 16 Pa. St. 63; *In re Hood's Estate*, 21 Pa. St. 106; *In re Enston*, 113 N. Y. 183, 21 N. E. 87; *In re Tulane*, 51 Hun. 213, 4 N. Y. Supp. 36. In *Foreign-Held Bond Tax Cases*, 15 Wall. 300, the court held that state and municipal bonds were tangible property, and classed railway and other securities as intangible.

<sup>112</sup> *Commonwealth's Appeal*, 11 Wkly. Notes Cas. 494.

<sup>113</sup> *Bacon's Estate*, *supra*.

<sup>114</sup> *In re Coleman's Estate* (*Commonwealth's Appeal*; 1893) 159 Pa. St. 231, 28 Atl. 137, 23 Pittsb. Leg. J. (N. S.) 211.

of personal property follows the domicile of the owner. It was said in *In re Small's Estate* <sup>115</sup> that, as a general rule, intangible personal property of a nonresident, such as bonds, mortgages, and other choses in action, is governed, as to its situs, by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under the act of 1887, because not situate in this state.

"Some species of personal property, it is true, when used in carrying on business, or for other particular purposes, may have an actual, as distinct from a legal, situs, but the local character of the use takes it out of the operation of the rule. And of this *Small's Estate* is, of itself, a striking illustration. Not only was the 'thing' given employed in a business which was, by its nature, localized, but the manifest intent of the testator was that it should remain in this state. The bequest was specifically of testator's interest, including all the property, real and personal, notes, stocks, bonds, and accounts, in a limited partnership organized under the laws, and having its principal place of business in this state.

"The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partners, as such, in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged on behalf of the commonwealth that this case rules the present, but the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor. \* \* \*

"The thing given was not lands, but an interest in its proceeds. If bonds, notes, stocks, and mortgages be intangible personal property, surely this is." <sup>116</sup>

In some of the earlier cases in the state, where the doc-

<sup>115</sup> 151 Pa. St. 1, 25 Atl. 23.

<sup>116</sup> *In re Coleman's Estate*, *supra*.

trine of the domicile does not seem to have been deemed material, such property was held liable, though the decedent, who at the time of his death was domiciled abroad, but previous to that time had been domiciled in Pennsylvania, left a will describing himself of Philadelphia, and his will probated there.<sup>117</sup>

So, in another case,<sup>118</sup> it was held that county and state stock belonging to a decedent domiciled abroad at the time of his death were taxable, upon the ground that there was a new administration in the state, and the funds were there. This was the early doctrine of the English courts.<sup>119</sup>

Recently it has been held in Pennsylvania that the interest of a nonresident deceased member of a limited partnership association, consisting of shares of stock, etc., in the company doing business in the state, is liable to taxation, where the real and personal property of the association is situated within the state.<sup>120</sup>

In holding such property taxable, the supreme court adopted the rule laid down in *Hoyt v. Com.*,<sup>121</sup> saying, with reference to the rule of the domicile: "The facts of this case, however, are different, and bring it within the exceptions to the fictitious rule. In the formation, location, etc., of their partnership association, the testator and his brothers evidently established the situs of the personal property, which constituted its capital. They organized the association un-

<sup>117</sup> *Com. v. Smith*, 5 Pa. St. 142, explained in *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834; *In re Short's Estate*, 16 Pa. St. 66; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82.

<sup>118</sup> *Alexander's Estate*, 4 Pa. Law J. 87; citing *In re Ewing*, 1 Crompt. & J. 151.

<sup>119</sup> *Attorney General v. Cockerell*, 1 Price, 165; *Attorney General v. Beetson*, 7 Price, 560. See, also, *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; *Alvany v. Powell*, 2 Jones, Eq. 57.

<sup>120</sup> *In re Small's Estate* (1892) 151 Pa. St. 1, 25 Atl. 23. See note to this case 32 Am. Law Reg. (N. S.) 364; 11 Pa. Co. Ct. R. 1.

<sup>121</sup> 23 N. Y. 224, 228.

der the laws of this state, located its principal office and conducted its business therein, and thus enjoyed the benefit of the law and protection of the state and local government. In such circumstances, \* \* \* the truth, and not the fiction, plainly affords the rule of action. Neither convenience nor justice requires us to resort to the fictitious rule."

Where decedent, a nonresident of Tennessee, shortly prior to his death, inherited a certain fund from his sister, a resident of that state, which was paid over to decedent's administrator in the state, and such administrator intended to make a final distribution in Pennsylvania, held that the fund had a situs in Pennsylvania, and not at the domicile of decedent, and so was subject to the tax.<sup>122</sup>

In New York, estates of nonresident decedents within the state were originally held not liable, upon a construction placed upon the statute, it being held that there was no intention on the part of the legislature to tax such estates.<sup>123</sup>

The principles adopted by the Pennsylvania courts were substantially applied, and it was held that stocks and bonds in the state, in the hands of an agent, were in no general sense property, and had no situs in the state, and that the policy of the state exempted them from general taxation.<sup>124</sup>

<sup>122</sup> *Weaver's Estate* (1895) 12 *Lanc. Law Rev.* 57. But see *In re Phipps* (1894) 77 *Hun*, 325, 28 *N. Y. Supp.* 330; *Id.*, 143 *N. Y.* 641, 37 *N. E.* 823. See *In re Thomas* (1893) 3 *Misc. Rep.* 388, 24 *N. Y. Supp.* 713.

<sup>123</sup> *In re Enston's Will*, 113 *N. Y.* 179, 21 *N. E.* 87; *In re Tulane*, 51 *Hun*, 213, 4 *N. Y. Supp.* 36. The statute (Laws 1885, c. 483, § 1) imposed the tax "upon all property which shall pass by will, or by the intestate laws of the state from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be within this state." See the subject considered in *Alb. Law J.* April 16, 1892, p. 331, by E. H. Blanc, Esq.

<sup>124</sup> *Id.*, citing *Williams v. Board of Supervisors of Wayne Co.*, 78 *N. Y.* 561. But see *Hoyt v. Commissioners of Taxes*, 23 *N. Y.* 224, citing *Catlin v. Hull*, 21 *Vt.* 152, and cases *supra*, page 169.

All the judges, however, did not concur in this result, which was reached by a bare majority;<sup>125</sup> and the dissenting opinion of Danforth, J., ably presents the contrary view of the question. The amended statute of 1887,<sup>126</sup> taxing the property of all nonresident decedents, showed the true policy of the state. Under this statute the lower courts held that tangible and intangible personal property of a nonresident within the state were liable to the tax. But until 1891 the question, under the amendatory act, never received any consideration by the court of appeals, although incidentally, in considering the law of 1887, all the judges agreed, in the *Enston Case*,<sup>127</sup> that it was meant to cover the estates of nonresident decedents, but to what extent was left undecided.<sup>128</sup>

This act<sup>129</sup> provided that all property passing by will or by intestate laws of the state, from any person who may die seised or possessed of the same while a resident of the state, or if such decedent was not a resident of the state at the time of death, which property, or any part thereof, shall be within this state, is subject to taxation. Under the act of 1892,<sup>130</sup> this provision is substantially continued. The act confers further jurisdiction by providing<sup>131</sup> that the words "estate" and "property" shall include all property or interest therein whether situated within or without this

<sup>125</sup> Danforth, J., wrote a dissenting opinion. Finch, J., concurred therein, and Ruger, C. J., did not vote.

<sup>126</sup> Laws 1887, Appendix, I.

<sup>127</sup> *Supra*.

<sup>128</sup> Appendix, I., Laws 1887, § 1, amending Laws 1885, c. 483. And see, also, *In re Clark's Estate* (Surr.) 9 N. Y. Supp. 444; *In re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759. See note to this case, 12 Lawy. Rep. Ann. 401, Alb. Law J. April 16, 1892, p. 331.

<sup>129</sup> See Appendix, I.

<sup>130</sup> Appendix, I. Laws 1892, c. 399, §§ 1-3.

<sup>131</sup> Laws 1892, § 22.

state, over which this state has any jurisdiction for the purposes of taxation."

In 1891 the construction of the act of 1887 came before the court of appeals, Second division,<sup>132</sup> with respect to the liability of a nonresident intestate; and it was held that the property of such decedent within the state, consisting of stocks and bonds of corporations, kept in a safe-deposit vault, money in savings banks, and mortgages upon real estate situated within the state, were liable to taxation.<sup>133</sup>

To the appellant's contention that the property was not within the state, according to the true meaning of the statute, but was presumed to be at the domicile, the court, per Vann, J., said: "The fiction of law that personal estate has no situs away from the person or residence of its owner is done away with, to a limited extent and for a specified purpose, and the truth is substituted in its stead as the rule of action. That the legislature had power to do this can hardly be questioned.<sup>134</sup> As was said by Judge Story, when writing upon this subject, 'a nation within whose territory any personal property is actually situated has as entire dominion over it, while therein, in point of sovereignty and juris-

<sup>132</sup> In re Romaine (1891) 127 N. Y. 86, 27 N. E. 759 (Haight, J., dissenting), affirming 58 Hun, 109, 11 N. Y. Supp. 313; 48 Phila. Leg. Int. 265, 267. See note to 44 Alb. Law J. Dec. 12, 1891, p. 478, entitled "The Act to Tax Inheritance." See article in 45 Alb. Law J. April 16, 1892, p. 331, entitled "Collateral Inheritance Tax in Connection with Transfer of Stocks and Loans by Foreign Executors and Administrators." The Romaine Case was followed in Re Duckworth (July 3, 1891) 5 N. Y. Law J. 864; Re Morejon, Id.; Re Bondon (March 1, 1892) 6 N. Y. Law J. 1322. See, also, In re Phipps (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823, on opinion below; In re James, 144 N. Y. 6, 38 N. E. 961, affirming 77 Hun, 213, 28 N. Y. Supp. 351, where the case of Romaine is distinguished. See, also, note on this case 12 Lawy. Rep. Ann. 401, 27 N. E. 759.

<sup>133</sup> Followed in Re Morejon, supra; Re Bondon and cases supra.

<sup>134</sup> In re McPherson, 104 N. Y. 306, 10 N. E. 685.



diction, as it has over immovable property situated there.' <sup>135</sup> Where the money of a nonresident is invested in this state, as it was by Mr. Romaine, in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a nonresident is habitually kept, even for safety, in this state, we think that the statute applies, both in the letter and spirit. Such property is within this state, in every reasonable sense, receives the protection of its laws, and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident. We think that a fair construction of the act permits no distinction as to such property, based simply upon the residence of the deceased owner. We have nothing to do with the policy of the statute, as our duty is discharged when we declare its meaning, and apply it to the case in hand. That duty we discharge in this instance by adjudging that succession to the personal property in question lately belonging to Worthington Romaine, a nonresident intestate, but invested or habitually kept by him in this state, is taxable under the collateral inheritance act, in so far as it passed to persons not excepted from its provisions." <sup>136</sup>

In this case it did not appear whether or not the bonds and stocks were of foreign corporations.

But, under a recent ruling of the court of appeals in *Re James*,<sup>137</sup> stocks and bonds, also, it would seem, in foreign corporations, belonging to the estates of nonresident decedents, and actually within the state, are held not liable to taxation under the act of 1887; the court holding that such certificates of stock are mere evidence of title, or of an in-

<sup>135</sup> Citing *Story*, *Conf. Laws*, § 550; *People v. Tax Com'rs*, 23 N. Y. 224, and other cases.

<sup>136</sup> Followed in *Re Phipps* (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823, mem.

<sup>137</sup> 144 N. Y. 6, 38 N. E. 961.

terest in the assets of the corporation, that they were at the domicile of the owner or corporation, and that they were not property, within the meaning of the statute, or intended to be taxed thereunder.<sup>138</sup>

In this matter, it appeared that James was a nonresident Englishman, and had the securities referred to above on deposit within the state, at and prior to his death. While the court conceded that it was the intention of the act of 1887 to tax the property of nonresidents within the state, it distinguished *In re Romaine*; holding there was no intention to tax certificates of stock in foreign corporations, forming part of a nonresident decedent's estate, and that, inasmuch as it appeared that none of the legacies under the will were to be paid out of the assets within the state, no tax could be imposed.<sup>139</sup>

Gray, J., said:

"In view of the importance of the ruling of the courts below upon the question of whether stocks of foreign corporations should be included in the valuation of testator's estate, it may be proper to express our judgment further. We do not think it was the intendment of the act of 1887 to reach, for purposes of taxation, any personal property that was not within the state, either in fact, or because of the domi-

<sup>138</sup> *In re James*, 144 N. Y. 6, 38 N. E. 961; affirming 77 Hun, 211, 28 N. Y. Supp. 351; reversing 27 N. Y. Supp. 288 (Surr.); and distinguishing *In re Romaine*, supra.

<sup>139</sup> In the supreme court below, it was held that a legacy under the will of a nonresident testator who leaves assets in New York is not taxable under the statute, unless paid out of the assets within the state. *In re James* (1894) 77 Hun, 211, 28 N. Y. Supp. 351. The appellate court held, however, that it did not lie with the state to say which part of testator's estate should be appropriated to the payment of the legacies, but that the executor had that right, and might pay them out of the foreign estate, and so save the estate here from the payment of a succession tax under the act. *Id.*, 144 N. Y. 6, 38 N. E. 961.

cile here of the owner. The reading of the act does not authorize us to construe it as an effort to tax that over which there was no jurisdiction, and it would be highly improper to impute to the legislature such an intention.<sup>140</sup> The stocks of foreign corporations, which formed part of the estate, were not property, in the legal sense. The share certificates which the testator held represented the interests which he possessed in the corporations which issued them, and the legal situs of that species of personal property is where the corporation exists, or where the shareholder has his domicile.

"We so held in the *Enston Case*,\* and the act of 1887 furnishes no evidence of any intention to change the policy of the law, which has regarded the stocks of foreign corporations as being taxable only in the place of the owner's residence, or in that of the corporations. In the *Romaine Case*,† nothing was decided to the contrary of this view. The property of the nonresident decedent, in that case, which was held to be liable to taxation, was stated to be a mortgage upon real estate in the city of New York, deposits in savings banks in that city, and stocks and bonds of different corporations, but, whether domestic or foreign, it was not made to appear."

The court also held, on the question of double taxation, that its result is one which the courts should incline to avoid whenever possible to do so.

There are several objections to this ruling in the *James Case*, in construing the act of 1887:

(1) The decision seems to be based upon the rule adopted under general property tax statutes, under which certificates of stock of foreign corporations within the state are

<sup>140</sup> But Act 1892, c. 399, § 22, Appendix, I., would seem to confer such power.

\* 113 N. Y. 181, 21 N. E. 87.

† 127 N. Y. 80, 27 N. E. 759.

not taxable, under the fiction of law, as against nonresidents; but as the inheritance tax does not tax any property, but merely the right or privilege of taking by will or descent, this fiction would seem to have no proper application to an inheritance tax.<sup>141</sup> This distinction does not seem to be observed in the *James Case*.

(2) Again, as is shown elsewhere, it perpetrates an unjust discrimination against the estates of resident decedents, as shown in *Re Romaine*, and also because stocks and bonds in foreign corporations were held taxable, as against the estates of such residents, in *Re Swift*,<sup>142</sup> the court holding that to compute the succession tax on the total personal estate was not imposing a tax on the stocks of foreign corporations constituting a part of the estate.<sup>143</sup>

(3) Regarding the holding that the state has no jurisdiction to tax such securities, as against nonresident decedents, and that it would be highly improper to impute to the legislature such an intention, the answer is that there can be no doubt, as we have shown elsewhere in this chapter, that the state has ample jurisdiction to tax, under these acts, all personal property both tangible and intangible, belonging to nonresident decedents, and actually within the state and protected by its laws.<sup>144</sup>

In order to compel such property to pay for the protection it receives, the state may give it a situs apart from the domicile of the owner, for the purpose of taxation. In such cases the fact and statutory intent, and not the fiction, must prevail.<sup>145</sup>

<sup>141</sup> Cooley, *Tax'n* (2d Ed.) p. 30, and see chapter 2, §§ 8, 17, and cases cited.

<sup>142</sup> 137 N. Y. 77, 32 N. E. 1096. See the question discussed by Ransom, S., in this case reported below in 16 N. Y. Supp. 193.

<sup>143</sup> See, also, *In re Merriam* (1894) 141 N. Y. 484, 36 N. E. 505.

<sup>144</sup> See, also, *Laws* 1892, c. 399, § 22.

<sup>145</sup> *In re Romaine*, *supra*; citing *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *People v. Tax Commissioners*, 23 N. Y. 224; *In re* (186)

(4) As to double taxation, it cannot always be avoided, and it impinges no rule of constitutional law. It is, at most, a mere matter of policy, for the taxing power or state to determine, and not for the courts.<sup>146</sup>

No state can be deprived of the right to tax such property because another state—the domicile of decedent—exercises the same power over, it may be, the same property. On grounds of policy and comity, however, the rule has been not to impose what would be, in effect, a double tax on nonresidents' estates, where it can possibly be avoided; but, as a matter of fact, this is done constantly, under these statutes.<sup>147</sup> In *Coleman's Estate*,<sup>148</sup> the court, treating the matter in this view, held there was a question of public policy involved in taxing nonresidents: "The rule that personal property follows the domicile is internationally recognized and observed, as being founded in convenience,<sup>149</sup> and a disregard of it here may react to the prejudice of our own citizens."

So, under the New York statute of 1891,<sup>150</sup> it has been recently held, in *Re Phipps*,<sup>151</sup> that the right to a legacy given by the will of a resident cannot be considered property located within the state for the purpose of taxation, against the estate of a deceased nonresident legatee, under

*Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823; *Story*, Conf. Laws, § 550; *Weaver's Estate* (1895) 12 Lanc. Law Rev. (Pa.) 57, and cases cited. See, also, *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Alvany v. Powell*, 2 Jones, Eq. 51. But see *Alb. Law J.* April 16, 1892, p. 332; citing *Story*, Conf. Laws, § 399; *Parsons v. Lyman*, 20 N. Y. 112.

<sup>146</sup> See chapter 2, § 19; *In re Swift* (Ransom, S.) N. Y. Law J. Nov. 21, 1891.

<sup>147</sup> See *In re Strong* (Aug., 1894) 17 N. J. Law J. 234.

<sup>148</sup> 159 Pa. St. 231, 28 Atl. 137.

<sup>149</sup> 2 Williams, Ex'rs, 1515.

<sup>150</sup> Chapter 215.

<sup>151</sup> 1894, 77 Hun, 325, 28 N. Y. Supp. 330; s. c., affirmed by court of appeals, on opinion below, 143 N. Y. 641, 37 N. E. 823, mem. See *In re Thomas* (1893) 3 Misc. Rep. 388, 24 N. Y. Supp. 713.

these acts. The facts were these: Phipps was a resident of Massachusetts. Under the will of one Fogg, a resident of New York, he became entitled to an interest in the residuum of her estate. This was appraised, and the tax thereon paid by Fogg's executors, but the legacy to Phipps was never paid, nor was it in a condition to be paid; he having died in Boston, while the Fogg estate was unsettled. By his will he gave his estate to his widow, and it was sought, in New York, by his ancillary executors, to ascertain whether the legacy to Phipps was taxable; in other words, whether it was property within the state. In holding the legacy not taxable, Van Brunt, P. J., in the supreme court, in an able opinion, said:

"The determination of the question as to whether any tax can be imposed, under the facts above stated, therefore, involves the inquiry whether the decedent had any property within this state at the time of his death. If he had, then, under the principle announced in *Re Romaine*,<sup>152</sup> it is liable.

"If he had not, then, clearly, there is nothing upon which the tax can operate.

"In the consideration of this question, it will not be necessary to note the difference between the law as it was originally enacted in 1885 and as it existed at the death of the testator, but simply to determine the question as to whether a right to a legacy given by the will of a resident of this state can be considered property located within this state. It seems to us that the mere statement of the proposition carries its answer with it, when we consider that the residence of a debtor does not fix the situs of the debt, but rather the domicile of the creditor.

"It is a familiar principle that the situs of personal property is presumptively the domicile of its owner, and its disposition is controlled by the laws of such domicile.

"But for certain purposes of taxation a different rule has

<sup>152</sup> 127 N. Y. 88, 27 N. E. 759.

obtained, because of statutes passed to prevent nonresidents having the protection of our laws for their property, which is invested and kept within this state without contributing to the expense of such protection.

“And it is in the same line of legislation that the statute of 1891 has been passed; and consequently, where a resident of another state dies the owner of personal property which he has habitually kept and invested in this state, it is liable to taxation, as has been adjudicated in the Case of *Romaine*, above cited. But it has not yet been determined that if a resident of another state dies, having debts due him by residents of this state, those debts are the subject of taxation, as being the property of the decedent within this state. That such property is not the subject upon which the act in question was intended to operate, seems to have been intimated in the Case of *Swift*,<sup>153</sup> where the property the subject of taxation is likened to realty, being tangible, and located within the limits of the state, as was the fact in reference to the estate of *Romaine*. But a mere chose in action—a right to recover a sum of money—has never, as yet, been given the attribute of tangibility, and this seems to be all that *Phipps* had at the time of his death. He had a right to claim the amount of money which his share of the residuary estate of *Mrs. Fogg* would result in,—nothing more; no particular piece of property, no particular sum of money, no particular representatives of money or property. And until this residuary estate was ascertained by an accounting of the executors, the legatee might not be even able to maintain an action for its recovery. It would appear, therefore, that a tax in this proceeding has been levied upon a legacy which not only had never been realized, but the right to the possession of which had never accrued.<sup>154</sup> And if, as inti-

<sup>153</sup> 137 N. Y. 77, 32 N. E. 1096.

<sup>154</sup> See *In re Weed's Estate* (1894) 10 Misc. Rep. 628, 32 N. Y. Supp. 777.

mated in *Re Romaine*, it was not the intention to attempt to levy a tax upon property, except such as the owner, at the time of his death, voluntarily permitted to remain in the state, how can such a tax be levied upon property which the decedent has never had it in his power to remove, if this unrealized legacy can be called property within this state? In other words, can this act be construed to cover a right at some future time to receive a sum of money, or to recover a debt?

"We think, clearly, it cannot, and that all that it was intended to cover was tangible property kept within this state by the decedent, and that property which is transiently here, as upon the person or in the baggage of a man suddenly dying within this state, was never intended to be covered by the provisions of the act. If the claim advanced in support of the tax in the case at bar is to prevail, then in every case such as has been cited must the tax be collected, which could never have been the intention of the legislature."

Real estate, however, belonging to a foreign decedent, is within these statutes, because it has a situs within the state, and the title must be transmitted according to the laws of the state governing its descent and conveyance.<sup>155</sup>

But it has been held in Pennsylvania that real estate within the state, directed by will of a nonresident to be converted into money, and the proceeds directed to be divided among collateral heirs, was not taxable in that state, the court following the rule of the domicile.<sup>156</sup>

It was originally held, in New York, the word "estate," in

<sup>155</sup> *Orcutt's Appeal*, 97 Pa. St. 184; *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111. Contra, on question of construction, *In re Enston's Will*, 113 N. Y. 181, 21 N. E. 87; *In re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36. See, also, *Chatfield v. Berchtoldt*, 7 Ch. App. 192.

<sup>156</sup> See section 46, subd. b; *In re Coleman's Estate* (1893) 150 Pa. St. 231, 28 Atl. 137; 23 Pittsb. Leg. J. (N. S.) 211. See, contra, *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; also, *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23.



these acts, related, not to the person of the decedent, but to the taxable property passing to the legatee or devisee.<sup>157</sup> But now, in New York, under the act of 1892,<sup>158</sup> it is held that the words "estate" and "property" mean the aggregate taxable property of the decedent, and not that of the legatee or devisee.<sup>159</sup> The same rule also prevails in Pennsylvania.<sup>160</sup>

(d) *Where Succession Takes Place for Purposes of Taxation.*

The result of the authorities as to the liability of the personal estates of nonresident decedents in a foreign state is far from being satisfactory, especially under statutes like those of New York, Pennsylvania, and Maryland. In the two latter states the cases of *Orcutt's Appeal*<sup>161</sup> and *State v. Dalrymple*,<sup>162</sup> where the facts would seem to be much alike, although the language of the statutes is somewhat different, are diametrically opposed; the former following

<sup>157</sup> *Com. v. Smith*, 5 Pa. St. 142; *Orcutt's Appeal*, 97 Pa. St. 179; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Howe*, 112 N. Y. 100, 19 N. E. 513; *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866, and chapter 3, § 41, and cases cited.

<sup>158</sup> Laws 1892, c. 399, §§ 2, 22, Appendix, I. e.

<sup>159</sup> *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311.

<sup>160</sup> Chapter 3, § 41.

<sup>161</sup> 97 Pa. St. 185, substantially followed in *Re Enston's Will*, 113 N. Y. 181, 21 N. E. 87, by a divided court. See, also, *In re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36; *Wallace v. Attorney General*, 1 Ch. App. 1, per Lord Chancellor Cranworth. But to a certain extent such estates are now taxable in New York under the Laws of 1887, 1891, and 1892. See *In re Vinot's Estate (Surr.)* 7 N. Y. Supp. 517; *In re Clark's Estate (Surr.)* 9 N. Y. Supp. 444; *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; *In re Enston's Will*, supra; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *In re James*, 144 N. Y. 6, 38 N. E. 961; *In re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330; *Id.*, 143 N. Y. 641, 37 N. E. 823; *In re Thomas*, 3 Misc. Rep. 388, 24 N. Y. Supp. 713. See article in *Alb. Law J.* April 16, 1892, p. 331.

<sup>162</sup> 70 Md. 294, 17 Atl. 82; *Alvany v. Powell*, 2 Jones, Eq. 51. And see cases supra.

the fiction of law as to intangible property only, and claiming to tax tangible property, and the latter declared public policy to prevent discrimination against resident decedents. *Orcutt's Appeal* is also opposed by the rule adopted in *Re Romaine*,<sup>163</sup> and by *Alvany v. Powell*; <sup>164</sup> and it has recently been distinguished and restricted by the supreme court of Pennsylvania, in *Re Small's Estate*.<sup>165</sup> But the question, which would seem to be one purely of construction, is of extreme importance, and remains unsettled in many states where the succession and legacy tax laws exist. As, in principle, these taxes are primarily imposed, not upon property, but upon the succession or devolution of property by will or intestate law, this would seem to be the only theory upon which such a tax can properly be maintained.<sup>166</sup>

Hence, in cases of this character, and especially where there is intestacy, the pivotal question would often seem to be, under what law is the succession had? That of the domicile, as claimed in England under the legacy act, or that of the actual situs of the property? And, if under the former, can there be a tax imposed at the real situs, upon the theory that there is a succession or an administration there for the purpose of taxation? A clear solution of these questions, so far as intestates is concerned, is difficult where, as in New York and Pennsylvania, the statutes speak of property "passing under the intestate laws of this state." Such intestate estates have been held liable in the former state, under the amendatory act of 1887,<sup>167</sup> though not liable un-

<sup>163</sup> *Id.*

<sup>164</sup> 127 N. Y. 88, 27 N. E. 759.

<sup>165</sup> 151 Pa. St. 1, 25 Atl. 23 (1892); 32 Am. Law Reg. (N. S.) 365.

<sup>166</sup> In *Re McPherson*, 104 N. Y. 306, 10 N. E. 685, the court held the tax could be constitutionally imposed whether it was considered a property or succession tax. See, also, *In re Sherwell's Estate*, 125 N. Y. 379, 26 N. E. 464. Contra, it seems, *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132.

<sup>167</sup> *In re Romaine*, 127 N. Y. 86, 27 N. E. 759; 48 Phila. Leg. Int. 365.

der the prior law;<sup>168</sup> the statute of 1887 providing that "*if such decedent was not a resident of this state at the time of death, which property or any part thereof, shall be within this state or any interest therein.*" The amendment is included in the italics, and the language would seem to be broad enough to cover both testates and intestates, as held in the Romaine Case;<sup>169</sup> otherwise, we have the strange result of a state taxing one class of foreign estates,—those belonging to testates,—and exempting the estates of those who die intestate. The act of 1892<sup>170</sup> now taxes the transfer of any property, real or personal, by will or intestacy, belonging to resident or nonresident decedents, where, as to the latter, the transfer of property within the state; and it further provides,<sup>171</sup> the words "estate" and "property" shall include all property, or interest therein, whether situated within or without the state, over which the state has any jurisdiction for the purposes of taxation.

Ordinarily, neither personal nor real property can have a situs in two states for the purpose of succession,<sup>172</sup> but there is no constitutional objection to a tax upon the succession in two states;<sup>173</sup> and as the situs at the domicile, where the property is in fact in a foreign state, is the result of a mere fiction of law, and as the property of residents and nonresidents receives alike the equal care and protection of such foreign state, it would seem that the legislature would have undoubted power, as had been done in Connecticut and other states, to make a special or particular succession by statute, as to personal property of nonresident decedents ac-

<sup>168</sup> In re Tulane, 51 Hun, 213, 4 N. Y. Supp. 36; In re Enston's Will, 113 N. Y. 181, 21 N. E. 87.

<sup>169</sup> Id.

<sup>170</sup> Laws 1892, c. 399, § 1.

<sup>171</sup> Laws 1892, c. 399, § 22.

<sup>172</sup> Kintzing v. Hutchinson, 34 Leg. Int. 365, Fed. Cas. No. 7,834.

<sup>173</sup> Chapter 2, § 19.

tually within its jurisdiction, whether tangible or intangible, for the purpose of taxation.<sup>174</sup> Otherwise, the fiction would be paramount to a positive statute.<sup>175</sup>

While the situs of personal property ordinarily follows the domicile of the owner, for particular purposes some species of personal property may have an actual situs distinct from the legal one, and is then taxable under these statutes.<sup>176</sup>

At least, no constitutional ground would seem to be invaded where either the person owning the property, or the property itself, is actually within the jurisdiction of the taxing state.<sup>177</sup>

The state may give shares of stock held by individuals a special or particular situs for the purpose of taxation, and may provide special modes for the collection of taxes levied thereon; and it is often convenient, as well as perfectly just, to adopt this course.<sup>178</sup>

Upon principle, if the tax can be imposed upon the tangible personal property of a nonresident decedent within the state, as held in *Orcutt's Appeal*,<sup>179</sup> there would seem to be no just reason why it should not equally be imposed upon

<sup>174</sup> See *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; *American Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Cook. Stocks & Stockh.* §§ 564, 566.

<sup>175</sup> See *Laws Conn.* 1889, Appendix, VII.; c. 2, § 26.

<sup>176</sup> *In re Weaver's Estate* (1895) 12 Lanc. Law Rev. (Pa.) 57, citing *Orcutt's Appeal*, 97 Pa. St. 179; *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, 28; *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137. See *In re Phipps* (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823, mem. See *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, affirming 107 Pa. St. 165.

<sup>177</sup> But see remarks of Gray, J., in *Re James*, 144 N. Y. 6, 38 N. E. 961.

<sup>178</sup> *Cooley, Tax'n* (2d Ed.) 23, citing *American Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Mayor, etc., of Baltimore v. Baltimore City Passenger R. Co.*, 57 Md. 31.

<sup>179</sup> 97 Pa. St. 179.

the intangible property actually within the taxing state, and protected by its laws.<sup>180</sup>

In conclusion, it may be said that the cases which exempt tangible or intangible property of nonresident decedents actually within the taxing state would seem to be objectionable upon several grounds:

First. The fiction upon which the rule is based, exempting such property, did not originally relate to questions of taxation, but, as we have seen,<sup>181</sup> was based merely upon questions of comity between states or nations. It never had any application to creditors of the deceased in the state where the property actually was situated, and should not exist against a state tax which the citizen is compelled to pay.<sup>182</sup>

"The fiction or maxim, '*Mobilia personam sequuntur*,'" says Comstock, C. J., in *Hoyt v. Tax Com'rs*,<sup>183</sup> "is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to pre-

<sup>180</sup> In *re Romaine*, 127 N. Y. 88, 27 N. E. 759; In *re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517; In *re Phipps*, supra; U. S. v. Rankin, 8 Fed. 874. See In *re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36. See the subject discussed Alb. Law J. April 16, 1892, p. 33.

<sup>181</sup> Supra, § 47, subd. b.

<sup>182</sup> See remarks of Lord Brougham in *Thomson v. Advocate-General*, 12 Clark & F. 28; *Bruce v. Bruce*, 2 Bos. & P. 229 note; *Catlin v. Hull*, 21 Vt. 158, cited and approved in *Hoyt v. Tax Com'rs*, 23 N. Y. 232; Whart. Priv. Int. Law, §§ 11-13, 297; *Green v. Van Buskirk*, 7 Wall. 150; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Lewis v. Woodford*, 11 Heisk. 25; *Birtwhistle v. Vardill*, 5 Barn. & C. 438, 451; *Alvany v. Powell*, 2 Jones, Eq. 51; *State v. Dalrymple*, 70 Md. 249, 17 Atl. 82; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876.

<sup>183</sup> 23 N. Y. 228, followed in *Graham v. First Nat. Bank*, 84 N. Y. 400, 401; In *re Romaine*, 127 N. Y. 86, 87, 27 N. E. 759. See *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488.

vent injustice, according to the maxim, 'In fictione juris semper æquitas existat.' \* \* \* Accordingly, there seems to be no place for the fiction of which we are speaking, in a well-adjusted system of taxation." This rule was recently followed in Pennsylvania.<sup>184</sup>

And Mr. Justice Gray, of the United States supreme court, has said of this maxim: "The old rule expressed in the maxim, 'Mabilia sequuntur personam,' by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could easily be carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*,—the law of the place where the property is kept and used."<sup>185</sup>

\* \* \* For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax."<sup>186</sup>

Second. It unjustly discriminates against the estates of resident decedents, and thus allows nonresidents greater privileges than those conferred upon the former.<sup>187</sup>

<sup>184</sup> *In re Small's Estate*, 151 Pa. St. 1, 25 Atl. 23.

<sup>185</sup> Story, *Conf. Laws*, § 550; Whart. *Conf. Laws*, §§ 297, 311.

<sup>186</sup> *Pullman's Palace Car Co. v. Pennsylvania* (1891) 141 U. S. 18, 22, 11 Sup. Ct. 876, affirming 107 Pa. St. 156. See the maxim also considered in 5 Pol. Science Quart. Dec. 1890, p. 646. *In re Small's Estate*, 151 Pa. St. 1, 14, 25 Atl. 23; approving *Hoyt v. Commissioners*, 23 N. Y. 224, 228. See note on the subject by McCarthy, 32 Am. Law Reg. April, 1893, p. 365; *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137; *In re Romaine*, 127 N. Y. 87, 27 N. E. 759.

<sup>187</sup> *Id.*

Third. It permits a vast amount of intangible personal property, under a mere fiction of law, such property being protected at all times by the state, to escape the common burden imposed upon like property belonging to citizens.

### § 48. Foreign Legacies.

The rule would appear to be equally well established, under these statutes, that as to the property of a nonresident decedent in the nature of legacies or shares, and termed "foreign legacies," brought or sent within the taxing state from abroad, after the death of the decedent, there is no liability for the tax.

Generally, the duty is only imposed upon property of nonresident decedents within the taxing state at the time of death. In cases of this character it is manifest that the actual as well as a domiciliary situs is in such foreign state when the ownership in the legacy accrues. Again, it may well be said, as to such property, there is no succession to it under or by virtue of the laws of the taxing state; hence, there would seem to be no reason whatever for imposing a tax upon a succession to such property.<sup>188</sup>

While, for the purpose of raising revenue under these laws, it is declared to be a mere matter of expediency whether the domicile of the decedent, or the situs of the property, be adopted as the rule, if there be neither of these within the taxing state, no government would impose a tax

<sup>188</sup> State v. Brevard, Phil. Eq. 141; Alvany v. Powell, 2 Jones, Eq. 51; State v. Brim, 4 Jones, Eq. 301; Com. v. Duffield, 12 Pa. St. 277; In re Hood's Estate, 21 Pa. St. 106; Orcutt's Appeal, 97 Pa. St. 184; Drayton's Appeal, 61 Pa. St. 172; In re Tootall's Trusts, 23 Ch. Div. 532. See, also, Weaver's Estate (1895) 12 Lanc. Law Rev. 57; In re Phipps (1894) 77 Hun, 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823; In re Thomas (1893) 3 Misc. Rep. 388, 24 N. Y. Supp. 713.

upon legatees or next of kin merely because of their residence within its jurisdiction.<sup>189</sup>

So where, under a general tax law, personal property sought to be taxed belonged to a nonresident, and was in the possession of one of several trustees residing outside the taxing state, it has recently been held that the mere fact that two of the trustees resided in the latter state did not warrant the imposition of a tax upon such property.<sup>190</sup>

#### § 49. Rules Where Nonresident Decedent's Debts Exceed Value of Estate.<sup>191</sup>

At law the settlement of the estate of a nonresident decedent, together with the title to his property in a foreign state, generally devolves upon a local administrator in such foreign state, whose business is to collect the assets, and, having satisfied the demands of creditors in such state, to remit the surplus of the proceeds to the executor or administrator at the place of domicile, for distribution among the unpaid creditors and next of kin.<sup>192</sup>

But, as debts or other lawful obligations exceeding the supposed value of the estate may often exist at the domicile, unknown to local representatives and tribunals, the difficulty early suggested itself, in such cases, of ascertaining the exact amount passing to the legatee or devisee whose interest it was sought to tax, and thus making it uncertain, to some extent, whether, should there be debts, any

<sup>189</sup> State v. Brim, *supra*; In re Hood's Estate, *supra*.

<sup>190</sup> People v. Coleman, 119 N. Y. 137, 23 N. E. 488; People v. Barker, 135 N. Y. 656, 32 N. E. 252.

<sup>191</sup> See, also, chapter 5, § 52, as to deduction of debts upon appraisement.

<sup>192</sup> In re Short's Estate, 16 Pa. St. 66; In re Del Busto's Estate, 23 Wkly. Notes Cas. 111; In re Enston's Will, 113 N. Y. 181, 21 N. E. 87.



surplus would exist, and, if so, the exact amount which would be subject to taxation.

Upon these grounds it was held in Pennsylvania that such a tax could not practically be imposed upon intangible personal property, except by the state of the domicile, where the final administration of the estate was made.<sup>193</sup>

The same ground of objection was raised in England, under the legacy and succession laws, as to all personal property of nonresidents,<sup>194</sup> although, as we have seen, the authorities in that country are not harmonious upon the subject, and the succession tax is, in many instances, imposed upon estates of nonresident decedents.<sup>195</sup>

In New York, in speaking of this subject <sup>196</sup> the law of 1885, which was held not to apply to nonresident estates, Andrews, J., said: "That [how much will pass to collaterals] can only be known after the entire expenses of administration and the debts and liabilities of the deceased have been ascertained and deducted at the place of his domicile. Suppose a nonresident dies leaving \$1,000,000 in this state, and is largely indebted at the place of his domicile, what his net estate will be after deducting debts and expenses of administration can only be ascertained at his domicile, where his estate must be finally administered and adjusted; and there

<sup>193</sup> Orcutt's Appeal, 97 Pa. St. 185, 186; In re Short's Estate, 16 Pa. St. 66; Commonwealth's Appeal, 34 Pa. St. 204; Strode v. Com., 52 Pa. St. 181; Com. v. Coleman, Id. 470, 472; In re Hood's Estate, 21 Pa. St. 106; In re Enston's Will, 113 N. Y. 181, 21 N. E. 87; In re Tulane, 51 Hun, 213, 4 N. Y. Supp. 36; In re Del Busto's Estate, 23 Wkly. Notes Cas. 111; In re Bacon's Estate, 3 Del. Co. Rep. 603.

<sup>194</sup> Wallace v. Attorney General, 1 Ch. App. 1.

<sup>195</sup> Supra, p. 163; In re Lovelace, 4 De Gex & J. 340; In re Wallop's Trust, 1 De Gex, J. & S. 356; In re Tootall's Trusts, 23 Ch. Div. 532.

<sup>196</sup> In re Enston's Will, 113 N. Y. 182, 21 N. E. 87; Danforth and Finch, JJ., dissenting, and Ruger, C. J., not voting. And see opinion Danforth, J., at page 185, 113 N. Y., and page 87, 21 N. E.

can be no way of adjusting the estate here, as there is no machinery in the law here appropriate to such a purpose, and thus it would be impractical to administer this statute."

"The tax," said the court in *Orcutt's Appeal*,<sup>197</sup> "does not attach to the very article of property of which the deceased died possessed.<sup>198</sup> It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net succession to the beneficiaries, and not on the securities in which the estate of the decedent was invested.<sup>199</sup> How, then, is it possible to impose a tax on this fund, when it has never been judicially ascertained how much, or whether any, of it will go to the collateral legatees? When the executrix charges herself with the fund received from the ancillary administrator, and settles her account in New Jersey, who can tell how much of it may be successfully claimed by creditors and others, as against legatees? The court of the testator's domicile is the only one that can properly determine how much of it will actually go to the collateral legatees."

But it would seem that in many instances these objections are liable to be more theoretical than real.<sup>200</sup> Assuming that there is an intention to tax nonresident decedents' estates, whether the tax shall be payable out of the specific taxable interest, or only upon the net surplus of the whole estate remaining after deducting just debts and liabilities owing either at the domicile or situs, must often depend upon the language of the statute; and its practical enforcement must, like that of every statute, depend upon the circumstances of

<sup>197</sup> 97 Pa. St. 185.

<sup>198</sup> But see, per Danforth, J., in *re Enston's Will*, 113 N. Y. 185, 21 N. E. 87.

<sup>199</sup> Citing *Commonwealth's Appeal*, *supra*; *Strode v. Com.*, *supra*.

<sup>200</sup> *Wallace v. Attorney General*, 1 Ch. App. 1. And see *Alvany v. Powell*, 2 Jones, Eq. 51; *In re Enston's Will*, 113 N. Y. 185, 21 N. E. 87.

each case. From the authorities, and on principle, it would appear that the tax can only fairly be imposed upon the net surplus passing to collaterals after all just debts and liabilities are deducted or paid.<sup>201</sup> Hence, where decedent's debts in another state exceed the value of the personality there, it is not liable to taxation.<sup>202</sup>

A fair and reasonable opportunity should therefore be afforded the estate, or its representatives, to show, as the fact may be, either that the estate is insolvent, and thus wholly unable to pay any tax, as no interest will pass to the heir, legatee, or devisee, or that, by reason of the existence of just and lawful demands at the domicile or situs, the tax should be proportionately reduced.

In some states the tax is upon the "clear value," or "clear market value," or "fair and clear market value," of the estate at decedent's death;<sup>203</sup> thus implying that outstanding debts and liabilities, at the time of death, that are just and legal, must be taken into consideration by the court or appraiser, in estimating the value of the taxable interest.

<sup>201</sup> *Strode v. Com.*, 52 Pa. St. 189, and cases *supra*.

<sup>202</sup> *Com. v. Coleman*, 52 Pa. St. 473.

<sup>203</sup> See Appendix, I, III., VII., *Laws Pa.* 1887, p. 79, § 1; *Laws N. Y.* 1887, c. 713, §§ 1, 2; *Laws 1892*, c. 399, § 6; *Laws Conn.* 1889, p. 106, c. 150. See *In re Astor*, 6 Dem. Sur. 411. Whether, under the New York statutes, deductions for debts can be made by the appraiser or court where they do not exist at decedent's death, but only arise in course of the administration of the estate, such as commissions of executors and expenses of administration, etc., which it has been the practice of appraisers or surrogates to deduct, see *In re Havens* (Aug. 1, 1890) 3 N. Y. Law J. 900; *In re Meyer* (May 26, 1891) 5 N. Y. Law J. 532; *In re Hope* (Feb. 13, 1893) 8 N. Y. Law J. 1164; *In re Sidell*, N. Y. Law J. (March 10, 1893). See, also, *In re Vassar*, 127 N. Y. S. 27 N. E. 394; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989; *In re Millward's Estate* (Surr.) 27 N. Y. Supp. 283; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096. See, also, *In re Gould* (June 18, 1895) 13 N. Y. Law J. 781, where it was held that all these items can be deducted by the appraiser.

And in New York the statute<sup>204</sup> provides that whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee or devisee, a proportion of the tax so paid shall be repaid to him by the executor, if the said tax has not been paid to the county treasurer, or by them if it has been so paid.<sup>205</sup>

Where the testator dies possessed of personal property in England, as well as abroad, the application for a return of the duty on the ground of debts must, under the English law, be made without taking into consideration the foreign assets; and, should he have incurred foreign debts, these must be paid out of the foreign assets, as far as they will be sufficient to satisfy them. But should the testator die out of England, leaving assets in the latter country, for which it is necessary to take out a grant, no application for the return of any portion of the probate duty in respect of debts incurred abroad will be entertained; for the executor who has taken out the grant there, after paying any debts incurred in England, in respect of which any application for a return of duty may be made, will transmit the remainder of the assets to the representative of the deceased in the country where he died, to be dealt with according to the law of that country.<sup>206</sup>

<sup>204</sup> Laws 1887, § 10; Laws 1892, c. 399, § 6. See St. Pa. Appendix, III., § 11.

<sup>205</sup> See *In re Enston's Will*, 113 N. Y. 186, 21 N. E. 87. See, under this section, *In re Howard*, 54 Hun, 305, 7 N. Y. Supp. 594; citing *Dewey v. Supervisors of Niagara Co.*, 62 N. Y. 294; *In re Hall's Estate* (Sup.) 7 N. Y. Supp. 595; also, *In re McMahon*, 1 How. Pr. (N. S.) 270. Redf. Sur. Prac. (4th Ed.) p. 586, considers this section 12, Act 1887, open to constitutional objection.

<sup>206</sup> Layton, Succ. & Leg. Duties, p. 250; citing *Reg. v. Commissioners of Stamps & Taxes (Ostell's Case)* 18 Law J. Q. B. 201.

## CHAPTER V.

## APPRAISER AND APPRAISEMENT.

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## § 50. Assessments and Assessors Generally, and Rules Regulating.

It is not inappropriate, in connection with the inheritance tax, to refer here to some of the rules at law regulating and governing assessments and assessors generally. An assessment under general tax laws is defined as the making out of a list of property and fixing its valuation or appraisement. It is so far an inseparable incident of taxation that no right of action arises until a legal assessment is made.<sup>1</sup>

Proceedings for the assessment of property are of a judicial character, and assessors or appraisers, in making assessments, act judicially.<sup>2</sup>

<sup>1</sup> Hil. Tax'n, p. 291, §§ 2, 3.

<sup>2</sup> In re McLean (1893) 138 N. Y. 158, 33 N. E. 821; Van Derventer

Their decisions, as a general rule, will not be reviewed, upon questions of value or appraisement, where the officers proceed upon information or evidence tending to support their decisions; and the courts will not generally look into questions of fact as to the amount or value of the personal estate of persons assessed. These are questions for the judgment of the assessors, and their decisions will ordinarily be sustained.<sup>3</sup>

But it is essential to the validity of every assessment that the statute under authority of which it is made should be complied with in every substantial particular.<sup>4</sup>

These principles apply to the appraisement under the inheritance and legacy tax laws, and to some extent the surrogate acts as an assessor.<sup>5</sup> As was said in *Re Wolfe*,<sup>6</sup> in construing the act of 1887: "The proper construction of this act makes of the surrogate the assessing and taxing officer, and, as such, the representative of the state for purposes relating to the appraisement and taxation of property. \* \* \* The surrogate should proceed with the assessment of the tax without notice to any state official."<sup>7</sup> "There is no difference between the principle upon which the surrogate acts in proceedings to assess property for taxation under the act, and that upon which, in the gen-

v. *Long Island City*, 139 N. Y. 133, 34 N. E. 774; *In re Ullmann*, 137 N. Y. 403, 33 N. E. 480, reversing 67 Hun, 5, 21 N. Y. Supp. 758.

<sup>3</sup> *People v. Barker*, 139 N. Y. 60, 35 N. E. 208; *People v. Hicks*, 105 N. Y. 189, 11 N. E. 653.

\* *Sanders v. Downs*, 141 N. Y. 422, 36 N. E. 391.

<sup>5</sup> *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156; *In re Ullmann*, 137 N. Y. 403, 33 N. E. 480; *In re Smith's Estate* (Surr.) 23 N. Y. Supp. 762; *Weston v. Goodrich*, 86 Hun, 194, 33 N. Y. Supp. 382; *McKean's Estate*, 29 Pa. Law J. (N. S.) 299; *Com. v. Freedley*, 21 Pa. St. 36.

<sup>6</sup> *Id.*

<sup>7</sup> But under Act 1892, c. 399, §§ 11, 12, notice for the appointment of appraisers under the act must be given to the county treasurer or comptroller.

eral system of taxation in the state, tax assessors act in the assessment of persons or property for purposes of taxation." The principles upon which the surrogate and town assessors act are similar.<sup>8</sup> In Pennsylvania the appraisement of land under these statutes is made in the same manner as land is assessed for general taxation.<sup>9</sup> In New York, under the act of 1887,<sup>10</sup> it is provided that the surrogate shall, from the appraiser's report, assess and fix the cash value of all estates, and the tax to which the same is liable; and it is held that this direction to assess involved the necessity as well as the power to determine the question of liability, as much as it does in the case of assessors under general tax laws. In this respect the surrogate is made an assessor. He must decide whether the property is taxable, for that fact lies at the foundation of his jurisdiction, and is of the essence of his right to proceed with the assessment.<sup>11</sup> So under the New York statutes the surrogate has original and exclusive jurisdiction as assessor and taxing officer, in the first instance, for all purposes relating to the appraisement and taxation of property, and no power is conferred upon the supreme court of the state, in an equity action, either to assess or determine such liability, in the first instance.<sup>12</sup>

In *Weston v. Goodrich*,<sup>13</sup> it was urged that, inasmuch as the supreme court and the surrogate's court had concurrent jurisdiction in many instances, and as the taxing act did

<sup>8</sup> *In re Smith's Estate*, *supra*.

<sup>9</sup> *McKean's Estate*, *supra*; *Com. v. Freedley*, *supra*.

<sup>10</sup> Chapter 713, §§ 1-13. See Laws 1892, c. 399, § 13.

<sup>11</sup> *In re Wolfe* (1893) *supra*, affirming 66 Hun, 389, 21 N. Y. Supp. 515, 522.

<sup>12</sup> *Weston v. Goodrich*, 86 Hun, 194, 33 N. Y. Supp. 382. But see Laws 1895, c. 556, amending Laws 1892, c. 399, § 13; *In re Ullmann*, *supra*.

<sup>13</sup> *Id.*

not in terms exclude any court, that the supreme court, as a court of general jurisdiction, might also assess and determine the tax, if incidental to the complete determination of an estate of which it had taken jurisdiction for some special purpose. In overruling this contention, Parker, J., said: "The premise, however, is faulty, in that the statute does not confer jurisdiction upon the surrogate's court as such in the first instance to assess and determine the tax. The surrogate, as a taxing officer, after the appraiser has appraised the property, enters his order fixing the tax 'as of course,' and thereafter any person aggrieved may appeal therefrom to the surrogate. By both the initial act of 1885 and the subsequent one of 1892 a special state tax not belonging to the system of general taxation was created. In character it was so entirely different from the general plan of taxation that special agencies were necessary for its enforcement. What those agencies should be, and under what rules and regulations they should proceed to enforce the collection of the tax, the legislature alone had power to determine. \* \* \* Instead of providing for the appointment of assessors or collectors or tax officers under some other name, to execute the provisions of the law, the legislature, not unwisely, determined that the surrogates of the several counties of the state were in a position to more economically and effectively enforce the collection of the tax than any other agency that could be devised, and so the surrogates were made special taxing officers, and charged with the duty of enforcing the collection of this special state tax upon such notice to those interested, and in the manner provided by the statute. That the statute constituted the surrogate, and he alone the assessing and taxing officer, and, as such, the only representative of the state, in the first instance, for all purposes relating to the appraisal and taxation of property, will clearly appear



from a brief reference to certain of its provisions.<sup>14</sup> \* \* \* It is clear that the initial steps which the statute requires the surrogate to take are those of taxing officers, and not of judges. He appoints an appraiser, to appraise the cash value of the property. Upon the coming in of the report, he may enter an order determining the cash value of the estate; \* \* \* but the party aggrieved may take an appeal from the order, \* \* \* and then, for the first time, the procedure takes on a judicial character. But it is no more so than that of a board of assessors who are required to give public notice of the completion of the assessment roll, and the time when they will hear all parties aggrieved, at which time those who are dissatisfied may appeal to the board of assessors, upon affidavits and other proofs, to make corrections of the assessment roll, in so far as it affects them."

But under an amendment recently passed in New York (in 1895),<sup>15</sup> jurisdiction is now conferred upon a justice of the supreme court in the district where decedent resided, within two years after the entry of an order of the surrogate assessing and fixing a tax, to grant a reappraisement of such estate, upon the application of the state comptroller, based upon his belief that the first appraisal was fraudulently, collusively, or erroneously made. Such appraiser shall have the same powers as an ordinary appraiser has under the act. This report shall be filed with the justice by whom he is appointed, and the same proceedings may be taken before him as before the surrogate. His determination and assessment shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller.

Again, the property appraisable and taxable under the

<sup>14</sup> Citing Laws 1892, c. 399, §§ 10, 11, 13.

<sup>15</sup> Appendix, I. e, Laws 1895, c. 556, amending Laws 1892, c. 399, § 13.

inheritance tax is not merely confined to property which is taxable under general tax laws. This was held upon the question as to whether a policy of insurance upon decedent's life was assessable and taxable by means of an inheritance tax. In holding it was, the court said:<sup>16</sup> "The taxable transfer law has no reference or relation to the general law. The two acts are not in *pari materia*. While the object of both is to raise revenue for the support of the government, they have nothing else in common. Nearly sixty years intervened between the passage of the earlier and the later statute, and the latter was enacted under different conditions from the former. It proceeds upon a new theory, of the right of government to tax and establish a new system of taxation. It taxes the right of succession to property, and measures the tax in the method specifically prescribed. All property having an appraisable value must be considered, whether it is such as might be taxed under the general law or not. Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance act. The definition of the different kinds of property which the legislature has incorporated in the general tax law, for the purpose of that law, cannot be imported into the collateral inheritance tax law, upon any sound principle of statutory construction." Under the legacy acts of congress, money received on life insurance, and distributed to heirs, was taxable; but under the succession acts, life insurance money for a policy taken out by another for the assured was not subject to the tax.<sup>17</sup>

<sup>16</sup> *In re Knoedler's Estate* (1893) 140 N. Y. 379, 35 N. E. 601, affirming 68 Hun, 150, 22 N. Y. Supp. 608.

<sup>17</sup> 3 Int. Rev. Rec. 140. For questions as to liability to pay duty on policies of insurance under the English law, see *Attorney General v. Yelverton*, 7 Jur. (N. S.) 1250; *Oldfield v. Preston*, 3 De Gex, F. & J. 398; *In re Jenkinson*, 24 Beav. 64.

### § 51. Appointment, Powers, and Duties of Appraiser.<sup>18</sup>

The proceeding for the appointment of an appraiser, the duties of such appraiser, and the method by which property subject to succession or legacy taxation is to be valued or appraised, are matters regulated by statute.<sup>19</sup>

An appraiser should be appointed only where specific legacies subject to the tax are given, or where taxable inheritances exist, or estates in fee are devised, or remainders, annuities, life estates, or terms of years are created.<sup>20</sup>

The appraiser may compel payment of his fees by mandamus against the county treasurer.<sup>21</sup>

In New York he is now required<sup>22</sup> to fix the fair market value, at the time of the transfer thereof, of property subject to the tax; and, by an act passed in New York, in 1891,<sup>23</sup> it is also provided that whenever, by reason of the provisions of any law, it shall become necessary to appraise, in whole or in part, the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall

<sup>18</sup> See, also, chapter 7, § 62. An appraiser who takes any fee or reward is guilty of a misdemeanor in New York. Laws 1893, p. 1725, c. 692, § 48.

<sup>19</sup> See statutes, Appendix, I., III., VII., VIII.,—Laws N. Y. 1892, c. 399, §§ 11, 12; Laws N. Y. 1887, c. 713, §§ 2, 13, 14; Laws Pa. 1887, p. 79, §§ 12, 13; Laws Conn. 1889, p. 106, c. 180, §§ 2, 12; 2 Code Md. 1888, p. 1242, §§ 104, 106, et seq.; Laws Ill. (By James B. Bradwell) 1895, p. 213, § 11. See statute, Appendix, X. For forms relating to appraisements, etc., in New York, see Appendix, I.; *In re Astor*, 6 Dem. Sur. 402.

<sup>20</sup> *In re Jones*, 5 Dem. Sur. 30, 19 Abb. N. C. 221.

<sup>21</sup> *In re Murray*, Bartlett, J., Kings Co., N. Y., unreported.

<sup>22</sup> Laws 1892, c. 399, § 11. The same under St. Ill. 1895, § 11, Appendix, X.

<sup>23</sup> Laws 1891, c. 34, § 1. See Appendix, I (f).

value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market, and the average of prices as thus found, running through a reasonable period of time. This statute is important, but how far it applies to appraisements under the inheritance tax laws does not appear to have been determined. It would seem to apply to all appraisements. Under the Pennsylvania statute, he is required to fix the value of estates subject to the tax, and to make a "fair and conscionable" appraisal of such estates, and to assess and fix the cash value of all annuities and life estates.<sup>24</sup> And by an amendment to this statute, passed in 1895,\* the registers of wills are authorized, with the approval of the auditor general, to appoint expert appraisers.

As it is primarily the duty of the executor to apply for the appraisal, under the New York statute, the power given to the surrogate to appoint an appraiser of his own

<sup>24</sup> See statutes, Appendix, III., § 12; *In re Goldstein's Estate*, 10 Phila. 319; *In re Kaas' Estate*, 45 Leg. Int. 217; Commonwealth's Appeal (*Cooper's Estate*) 127 Pa. St. 435, 17 Atl. 1094; and cases *supra*. As to appraisal of partnership interests and assets, see Commonwealth's Appeal (*Fagely's Estate*) 128 Pa. St. 604, 18 Atl. 386; *In re Wheeler's Estate* (1892) 1 Misc. Rep. 450, 22 N. Y. Supp. 1075. For mode of ascertaining duty under English legacy and succession acts, see 36 Geo. III. c. 52, § 22; 16 & 17 Vict. c. 51, §§ 10, 21, 22, et seq.; *Attorney General v. Earl of Sefton*, 11 H. L. Cas. 257, 269, 2 Hurl. & C. 362; *Attorney General v. Dardier*, 11 Q. B. Div. 16.

\* See Appendix, III., Laws 1895, No. 243, p. 325.

motion is not intended to relieve the representatives of the estate from their duty in this respect;<sup>25</sup> and where the legacies are in cash the court or surrogate fixes and assesses the tax upon the face value thereof, and no appraiser is necessary.<sup>26</sup>

The appraiser is not appointed to fix the value of property which is not subject to the tax.<sup>27</sup>

An appraiser will not be appointed, under the transfer act, for the purpose of procuring an adjudication as to the liability of the estate, where the petitioner swears to the belief that no portion of the estate is liable to the tax. The act only provides for the appointment of an appraiser where the estate is subject to the payment of the tax,<sup>28</sup> and an appraiser will only be appointed to take proof and report upon an application submitted therefor containing a statement of the facts involved.<sup>29</sup>

An appraiser will not be dispensed with where the estate consists of a mortgage the value of which may exceed its face.<sup>30</sup>

The object of the appraisement, as well as the duty of the appraiser, is not to determine whether the estate is sub-

<sup>25</sup> *Frazer v. People* (Surr.) 3 N. Y. Supp. 134. But see *In re Farley*, 15 N. Y. St. Rep. 727.

<sup>26</sup> *In re Astor*, 6 Dem. Sur. 402; *Id.* (Surr.) 2 N. Y. Supp. 630; *In re Jones*, 5 Dem. Sur. 30; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895; *In re McGowan's Estate*, 3 N. Y. Law J. (July 30, 1890) p. 888; *In re Pond*, N. Y. Daily Reg. May 25, 1889; *In re Somerville* N. Y. Law J. Jan. 21, 1893. *Contra*, *In re Peck's Estate* (Surr.) 9 N. Y. Supp. 465. As to \$500 legacies, see chapter 3, § 41.

<sup>27</sup> *In re Astor* (Surr.) 2 N. Y. Supp. 630; *In re Jones*, 19 Abb. N. C. 221; *In re Cahn*, 9 N. Y. Law J. April 13, 1893, p. 116.

<sup>28</sup> Laws 1892, c. 399.

<sup>29</sup> *In re Cahn* (April 13, 1893) 9 N. Y. Law J. 116, citing *In re Wolfe*, 137 N. Y. 214, 33 N. E. 156.

<sup>30</sup> *In re Somerville* (Jan. 21, 1893) 8 N. Y. Law J. p. 956.

ject to the tax, but simply to ascertain the value of the estate; and where it is not subject to be assessed with the tax the entire proceeding is a nullity, for it is only as to estates that are, or shall be, subject to the payment of the tax, that the register has any power for the purpose of appraisal and assessment; and the owner of the estate is not bound to submit the question of his liability to pay the tax either to the register or to the appraiser.<sup>31</sup> The appraisal, as a general rule, should be restricted to the taxable estate or interest,—that only being liable to the tax,—and should not include the general property of the decedent,<sup>32</sup> unless it is all liable to taxation.<sup>33</sup> Under the laws of New York and Pennsylvania the general estate of the decedent is liable to taxation. The tax is imposed upon that.<sup>34</sup> Where the estate is insufficient to pay legacies in full, and the will provides that legatees should receive their proportionate shares, the appraisers should report the proportionate value of each share. No tax can be determined until their proportionate value has been ascertained.<sup>35</sup>

The duties of the appraiser, under the New York statute, were defined by Surrogate Ransom in *Re Astor*:<sup>36</sup> He

<sup>31</sup> *Stinger v. Com.*, 26 Pa. St. 424, 429; *In re Kaas' Estate*, 45 Leg. Int. 217. But see *In re Astor*, 6 Dem. Sur. 410.

<sup>32</sup> *In re Jones*, 5 Dem. Sur. 30; *In re Robertson*, Id. 92; *In re Floyd* (March 3, 1891) 4 N. Y. Law J. 1378. But see *Com. v. Kerchner*, 24 Wkly. Notes Cas. 260; *Com. v. Boyle*, 2 Del. Co. Rep. 335; chapter 3, § 41.

<sup>33</sup> *In re Swift (Surr.)* 16 N. Y. Supp. 193; Id. (Sup.) 19 N. Y. Supp. 292; Id., reversed on another point, 137 N. Y. 77, 32 N. E. 1096.

<sup>34</sup> *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. See chapter 3, § 41.

<sup>35</sup> *In re O'Sullivan*, N. Y. Law J. Oct. 23, 1890; *In re Somerville* (Jan. 21, 1893) 8 N. Y. Law J. 956.

<sup>36</sup> 6 Dem. Sur. 415.

should report any property, estate, or interest therein subject to the tax.<sup>37</sup> It is not his duty to report exemptions,<sup>38</sup> or to fix the value of property not subject to the tax; and, where he has not reported all property that is subject thereto, exception may be raised upon the hearing on his report, and, where the exception is sustained, the report will be sent back for further appraisement.<sup>39</sup> And where the appraiser is in doubt regarding the liability of any property, he should report it as subject to the tax.<sup>40</sup> He had no power, under the New York acts in existence prior to 1892, to take testimony under oath,<sup>41</sup> but now, by the transfer act of 1892,<sup>42</sup> such power is conferred, as he has power to issue subpoenas to compel the attendance of witnesses before him, and to take the evidence of such witnesses, under oath, concerning such property, and the value thereof. The same power is conferred upon the appraiser under the Illinois statute.<sup>43</sup> In Pennsylvania it would seem that such power is conferred.<sup>44</sup> All papers relating to matters before the appraiser, should be submitted to him before he makes his report to the surrogate, otherwise, the matter will be referred to him to proceed *de novo*.<sup>45</sup> The names of all persons entitled to notice should be given in the order appoint-

<sup>37</sup> Laws 1885, c. 483; Laws 1887, c. 713, § 13,—Appendix, I.; *In re Wallace's Estate* (Surr.) 4 N. Y. Supp. 465.

<sup>38</sup> *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re McGowan's Estate* (July 30, 1890) 3 N. Y. Law J. 888.

<sup>39</sup> *In re Matthews' Estate*, N. Y. Law J. July 27, 1889; *In re Jones' Estate* (July 31, 1890) 3 N. Y. Law J. 896; *In re Benet's Estate*, N. Y. Daily Reg. March 4, 1889.

<sup>40</sup> *In re Hendricks*, 3 N. Y. Supp. 281; *In re McGowan's Estate*, *supra*; *In re Floyd*, *supra*.

<sup>41</sup> *In re Astor*, 6 Dem. Sur. 410.

<sup>42</sup> Chapter 399, § 12.

<sup>43</sup> Act 1895, Appendix, X., § 11.

<sup>44</sup> *In re Kaas' Estate*, 45 Leg. Int. 217.

<sup>45</sup> *In re Jones' Estate* (July 31, 1890) 3 N. Y. Law J. 896.

ing the appraiser. To these he must give notice of the proceeding,<sup>46</sup> and he should also state in his report whether any other persons claim any interest in the property appraised;<sup>47</sup> and all parties notified have the right to attend before him, and to be heard on the question of the value of the property, and its or their liability to the tax.<sup>48</sup> Under the act of 1892<sup>49</sup> this notice must also be given to the county treasurer or comptroller. No such notice to these officials or to any state official, was required under the acts in existence prior to 1892.<sup>50</sup> As to persons not notified or heard, the proceedings are void.<sup>51</sup> Under general tax laws, in order to make an assessment judicially valid, there must be notice to the party interested in the determination, and an opportunity to be heard.<sup>52</sup>

Upon a subsequent occasion, in defining the duties of the appraiser, Surrogate Ransom said,<sup>53</sup> in a case where it was objected that the appraiser had no power to construe clauses of the will for the purpose of reporting legacies liable to the tax: "It is certainly the appraiser's duty to examine the will to see what its provisions are, and as certainly his duty to call the attention of the surrogate to any facts that appear to him as constituting sufficient reasons for reporting such legacies as subject to the tax. His duty is to place

<sup>46</sup> Laws 1892, c 399, § 12.

<sup>47</sup> In re Astor, 5 Dem. Sur. 410; In re Vanderbilt's Estate (Surr.) 10 N. Y. Supp. 293; In re McPherson, 104 N. Y. 306, 10 N. E. 685; Coxe's Appeal, 1 Purd. Dig. (10th Ed.) 218, note.

<sup>48</sup> In re Astor, *supra*. But see *Stinger v. Com.*, 26 Pa. St. 424.

<sup>49</sup> Appendix, I. e, Laws 1892, c. 399, § 12.

<sup>50</sup> In re Wolfe, 137 N. Y. 205, 33 N. E. 156.

<sup>51</sup> In re Cockey, 8 N. Y. Law J. March 21, 1893, p. 1507.

<sup>52</sup> *People v. Gilon*, 121 N. Y. 551, 558, 24 N. E. 944; *Stuart v. Palmer*, 74 N. Y. 183, 190.

<sup>53</sup> In re McGowan's Estate, 3 N. Y. Law J. July 30, 1890, p. 388. See In re Knoedler's Estate (1893) 140 N. Y. 379, 35 N. E. 601; In re Ullmann, 137 N. Y. 403, 33 N. E. 480.



all the facts before the surrogate. The report is not final. It is to aid the surrogate to decide what property is liable to the tax, and it is subject to the confirmation, revision, or rejection by the surrogate. The facts in this case ascertained by the appraiser, and undisputed, show that the legacies in question passed to a person not exempted. On those facts the surrogate construes the will." Where it appears from decedent's will that the intention was that the legatees should take per capita, and not per stirpes, and the appraiser makes a miscalculation of values by reporting that the legatees take per stirpes, the matter will be remitted to him for correction and further report.<sup>54</sup>

By express provision of the statutes of New York<sup>55</sup> and Illinois,<sup>56</sup> and by that of Pennsylvania,<sup>57</sup> an appraiser may be appointed as often as, and whenever, occasion may require; but it seems that where an appraiser is appointed, and other interests accrue after his appointment, but before his report is filed, he has power to appraise such interests, and to report them for taxation.<sup>58</sup> And when property has been omitted, by mistake, fraud, or concealment, from the first appraisement, another will be allowed.<sup>59</sup>

Under a recent statute<sup>60</sup> passed in New York, in cases of this character, where there has been an assessment before the surrogate, another assessment may be allowed by a justice of the supreme court, upon the application of the

<sup>54</sup> *In re Dreyer*, N. Y. Law J. Feb. 17, 1892.

<sup>55</sup> Appendix, I. a, e, Laws 1887, § 13; Laws 1892, c. 399, § 11.

<sup>56</sup> Appendix, X., § 11.

<sup>57</sup> Appendix, III., § 12.

<sup>58</sup> *In re Stewart* (Surr.) 10 N. Y. Supp. 15; *Id.*, 131 N. Y. 274, 30 N. E. 184.

<sup>59</sup> *Com. v. Freedley*, 21 Pa. St. 36; *In re Astor*, *supra*; *In re Smith's Estate* (Surr.; 1893) 23 N. Y. Supp. 762, distinguishing *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156.

<sup>60</sup> Laws 1895, c. 556, amending section 13, Laws 1892, c. 399. See Appendix, I.

state comptroller, within two years from the first assessment.

The appraiser should report vested, though defeasible, interests, and so much of the residuary estate as was ascertainable at the time of the appraisement. Should the residuary estate be increased by the receipt of additional assets, or by other defeasible interests falling into and becoming a part of the same, another appraisement may then be had.<sup>61</sup>

### § 52. Land and Personal Estate, and Where Appraised—"Fair Market Value."

The fact that these statutes require the property to be appraised, in order to fix the amount of the tax, does not make the tax imposed upon the appraised value unconstitutional, as a property tax, because it is the privilege of taking by will or descent which is taxed, and the appraisement is merely a means of ascertaining the value of such privilege.<sup>62</sup> Under the Pennsylvania statute, the appraisement and proceedings thereunder must be had in the county where the letters testamentary and of administration have been issued, but the appraiser may legally appraise land situate in other counties.<sup>63</sup> In Maryland the statute<sup>64</sup> provides for the appointment of two appraisers where there is land in different counties. But, where there are several tracts of land to be valued, they should be valued separately, as occupied by the tenants;<sup>65</sup> and the appraisement is made,

<sup>61</sup> *In re Stanford* (May 6, 1893) 9 N. Y. Law J. p. 327.

<sup>62</sup> *Wallace v. Myers*, 38 Fed. 184; *In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096. See chapter 2, § 8.

<sup>63</sup> *Stinger v. Com.*, 26 Pa. St. 429, 431.

<sup>64</sup> Appendix, VIII., § 108.

<sup>65</sup> *In re McKean's Estate*, 29 Pa. Law J. (N. S.) 299.

as we have seen, in the same manner as land is assessed for general taxation purposes.<sup>66</sup>

In New York <sup>67</sup> the appraiser appointed by the surrogate first acquiring jurisdiction may appraise real estate in bulk, though it be situate in different counties.<sup>68</sup> In ascertaining the value of property, the appraiser is not bound by a valuation fixed upon by a general appraisement for the purpose of filing an inventory, where the state was not a party to the proceeding.<sup>69</sup>

But it seems that if the property has no salable value, nor any actual or potential annual value, at the time when the succession accrues, it is not capable of being assessed,<sup>70</sup> and neither possible increase nor diminution in the value of the property after the succession accrues is dealt with.<sup>71</sup>

The interest of an infant decedent in the proceeds of the sale of land in partition is not exempt from taxation as real estate under the act of 1892.<sup>72</sup>

The existence of a partition suit will not prevent the appraisement of the property sought to be partitioned, nor does the sum realized upon a sale in such suit fix the value for the purpose of taxation under the inheritance tax.<sup>73</sup>

Where real estate passes to a person who is subject to

<sup>66</sup> See cases *supra*, section 50; *In re McKean's Estate*, *supra*; *Com. v. Freedley*, 21 Pa. St. 36.

<sup>67</sup> Appendix, I. a, Laws 1887, §§ 15, 17.

<sup>68</sup> *In re Keenan's Estate* (Surr.) 5 N. Y. Supp. 200.

<sup>69</sup> *In re Pinckney* (Nov. 19, 1894) 12 N. Y. Law J. 453.

<sup>70</sup> *Attorney General v. Earl of Sefton*, 11 H. L. Cas. 257, 269.

<sup>71</sup> See *post*, § 55, and *Com. v. Freedley*, 21 Pa. St. 36; *Stinger v. Com.*, 26 Pa. St. 425; *In re Miller's Estate*, 45 Leg. Int. 175; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895. But see *Attorney General v. Dardier*, 11 Q. B. Div. 16; *In re Stewart's Estate* (Surr.) 10 N. Y. Supp. 15; *Id.*, 131 N. Y. 274, 30 N. E. 184; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394; *In re Floyd* (March 3, 1891) 4 N. Y. Law J. 1378.

<sup>72</sup> Chapter 399, § 2; *In re Stiger* (Surr.) 28 N. Y. Supp. 163.

<sup>73</sup> *In re Lederer*, 5 N. Y. Law J. 957.

the tax, the order of assessment must describe the same, so that in issuing receipts the county treasurer may designate on what real property the tax has been paid.<sup>74</sup>

Real estate which has once paid the tax is not liable to taxation again, although it sold subsequently at a much higher rate.<sup>75</sup>

Where there is no evidence as to the value of an asset (i. e. a claim upon which interest has been paid), it must be appraised at par.<sup>76</sup>

Under general tax laws, it has been held that dividends are not proof of the earning power of corporate property, but they are competent evidence upon the question what is the earning power of corporate property, which is a feature to be considered in valuing such property for the purposes of taxation. It is error to base an assessment of the property of a corporation on the market value of the corporate stock.<sup>77</sup>

In New York the statute requires the appraiser to appraise the property, both real and personal, at its "fair market value"<sup>78</sup> or "fair and clear market value."<sup>79</sup> These phrases would seem to be synonymous,<sup>80</sup> and to require all just debts and liabilities due and owing by decedent at the

<sup>74</sup> Laws 1887, c. 713, § 23; Laws 1892, c. 399, § 16; *In re Jones*, 7 N. Y. Law J. 578.

<sup>75</sup> *In re Russell's Estate* (1886) 19 Wkly. Notes Cas. 256.

<sup>76</sup> *In re Pinckney*, 12 N. Y. Law J. 453.

<sup>77</sup> *People v. Barker* (1894) 81 Hun, 25, 30 N. Y. Supp. 586. See *Id.* (Sup.) 32 N. Y. Supp. 990, citing *Union Trust Co. Case*, 126 N. Y. 433, 27 N. E. 818.

<sup>78</sup> See Appendix, I. a, e, Laws 1887, c. 713, § 13; Laws 1892, c. 399, §§ 11, 12.

<sup>79</sup> Laws 1887, c. 713, § 2; Laws 1892, c. 399, § 11.

<sup>80</sup> *In re Astor*, 6 Dem. Sur. 411; *In re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895. See *In re Cooper's Estate*, 127 Pa. St. 440, 17 Atl. 1094; *Com. v. Freedley*, 21 Pa. St. 33. In Connecticut it is "the actual value" or "actual mar-

time of his death to be deducted from the market value of the estate.<sup>81</sup>

The appraiser should not deduct a mortgage upon foreign real estate belonging to decedent, it appearing that the land was worth above the face of the mortgage.<sup>82</sup>

The court said:

"The executors claim that being responsible for the amount of the mortgage, as a debt of the testator, there should be a deduction from the amount of the estate of one-half of his debt, and claim that there is no provision of statute in New Jersey similar to that in this state, which charges the heir or devisee with the burden of the mortgage. It is elementary that, where a person claims under a foreign law, that foreign law must be established by competent evidence, as any other fact, and in the absence of proof the court is bound to presume that the law is the same as prevails in this state. There was no proof before the appraiser as to the law of the state of New Jersey. In this state the mortgagee must exhaust his remedy against the realty, and, so far as the personalty is concerned, it is exonerated from the payment of the mortgage debt. But, even if the law were established as claimed, the surrogate would certainly require proof that the property would not be sufficient to pay the amount of the mortgage debt.

"The proof as above stated would negative such a prop-  
ket value." Laws Conn., Appendix, VII., §§ 2, 12. In Maryland it is the "clear value," "appraised value," "true value." Laws Md., Appendix, VIII. a, §§ 102, 104, 112.

<sup>81</sup> Orcutt's Appeal, 97 Pa. St. 175; Avery's Estate, 34 Pa. St. 204; Strode v. Com., 52 Pa. St. 181; Rubincam's Estate, 38 Leg. Int. 261; Kaas' Estate, 45 Leg. Int. 217; Cullen's Estate, 26 Wkly. Notes Cas. 216; Com. v. Coleman, 52 Pa. St. 473; Cooper's Estate, 127 Pa. St. 435, 17 Atl. 1096; In re Enston's Will, 113 N. Y. 181, 21 N. E. 87. See Mellon's Appeal, 114 Pa. St. 569, 8 Atl. 183; Williamson's Estate, 49 Leg. Int. 106.

<sup>82</sup> In re Colhoun, 7 N. Y. Law J. 505.

osition, \* \* \* the property being worth more than the amount of the mortgage. The appraiser's report is confirmed."<sup>83</sup>

Under the New York statutes<sup>84</sup> providing that an heir or devisee shall, out of his own property, satisfy any mortgage to which the land descended or devised is subject unless the will directs otherwise, the personal estate of a testator who devised land subject to mortgage is not liable for the mortgage debt, to the exoneration of the land, unless the will so provides; and the amount of the mortgage will therefore be deducted from the value of the land, in assessing the transfer tax.<sup>85</sup>

While, in New York, it has been customary for appraisers, under these acts, to do so, there is nothing in the language of the statutes expressly authorizing the appraiser, in his report, to deduct from the value of the taxable estate of a decedent any debts of decedent, expenses of administration, funeral expenses, or commissions of executors. It is held, under the act of 1892, and prior acts, that the appraiser has no power to deduct these items.<sup>86</sup>

That which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.<sup>87</sup>

Neither is such power apparently conferred upon the surrogate. In *Re Millward*<sup>88</sup> the surrogate said: "It can-

<sup>83</sup> Followed in *Re Russak*, 10 N. Y. Law J. 530.

<sup>84</sup> 1 Rev. St. p. 749, § 4.

<sup>85</sup> In *re Kene* (Surr.) 29 N. Y. Supp. 1078.

<sup>86</sup> In *re Millward's Estate* (Surr.; 1894) 27 N. Y. Supp. 286; citing *In re Swift*, 137 N. Y. 77, 32 N. E. 1096. See, also, on this point, *Id.*, 16 N. Y. Supp. 193, per Ransom, S., affirmed 19 N. Y. Supp. 292; *In re Ludlow's Estate* (1893) 4 Misc. Rep. 594, 25 N. Y. Supp. 989. But, contra, *In re Gould* (1895) 13 N. Y. Law J. 781.

<sup>87</sup> In *re Swift*, *supra*.

<sup>88</sup> *Id.*

not be discovered that the act anywhere expressly authorizes the surrogate to deduct from the appraised value any debts, funeral expenses, commissions of executors, or expenses of administration; and it is therefore fairly questionable whether the legatees do not take cum onere, as the tax is not put upon what the legatee may get, but upon the value of the estate at the point or period of the transfer, which is the death of the testator."<sup>89</sup> The court held that it might fairly be inferred that the legislature intended that debts owing by decedent should be deducted from the value of the estate, and this could be done by the surrogate on appeal from the appraisers' report.<sup>90</sup> A contrary view of this question has been recently taken by the surrogate in New York county.<sup>91</sup> The appraiser should reduce the value of the personal estate by the amount of any taxes or assessments due at decedent's death.<sup>92</sup>

An appraiser cannot deduct from the personalty the amount of a mortgage upon real estate belonging to decedent situate in another state, where the law of that state is not proved, and where it appears that the property is worth more than the amount secured by the mortgage.<sup>93</sup>

Regarding the commissions of executors, and expenses of administration, they accrue and only become chargeable, in New York, upon the final accounting of the executors.<sup>94</sup> They are not, therefore, it would seem, debts of decedent existing at death, when, except in cases of future or contingent estates, the tax generally becomes due.

It is therefore questionable whether such items can be

<sup>89</sup> See *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>90</sup> *In re Millward* and *In re Ludlow*, *supra*.

<sup>91</sup> *In re Gould*, *supra*.

<sup>92</sup> *In re Pinckney*, 12 N. Y. Law J. 453.

<sup>93</sup> *In re Colhoun*, 7 N. Y. Law J. 505. *In re Russak*, 10 N. Y. Law J. 530.

<sup>94</sup> Bliss' Code N. Y. (4th Ed.) § 2730, and cases cited.

deducted by the appraiser, or allowed by the surrogate, at least until there has been a final accounting, because only then can they be legally and definitely ascertained. It has therefore been the practice, under the New York statutes, to leave these items for determination to the final account, when, if necessary, another appraisement can be had.<sup>95</sup>

It seems that the amount in value of the estate or property to be taxed should be fixed with mathematical certainty, and not by mere estimate or approximation. This is easily done on general or specific legacies, but on those embraced in a residuary clause such amount subject to the tax, if any, cannot be fixed until an accounting shall have been had, if debts, funeral expenses, commissions of executors, and expenses of administration are to be deducted.<sup>96</sup>

Whether such items are legally deductible from the taxable estate in any event is a question which does not seem to have been determined under the New York statutes. They have been held deductible, however, in a recent case<sup>97</sup> in the county of New York. It has been held, however, that the claim of the state for taxes due at death cannot be postponed until final accounting of the executors.<sup>98</sup>

In Pennsylvania the tax accrues at decedent's death, unless enjoyment is postponed by a life estate in another, and except, in case of such postponed enjoyment, the value at the time of the testator's or grantor's death is the basis for calculating the amount of the tax.<sup>99</sup>

The tax is to be assessed upon the clear value of the prop-

<sup>95</sup> *In re Havens*, 3 N. Y. Law J., Aug. 1, 1890, p. 900; *In re Meyer*, 5 N. Y. Law J. May 26, 1891, p. 532; *In re Hope*, 8 N. Y. Law J. 1164; *In re Sidell*, 1 N. Y. Law J. March 18, 1893; *In re Millward*, *supra*. Contra, *In re Gould* (June 18, 1895) 13 N. Y. Law J. 781.

<sup>96</sup> *In re Millward*, *supra*.

<sup>97</sup> *In re Gould*, *supra*.

<sup>98</sup> *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>99</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.



erty, and what that value may be can be ascertained only by allowing for all lawful charges.<sup>100</sup>

The register or appraiser has authority to pass upon the reasonableness of the charges of settling the estate in order to determine its value.<sup>101</sup>

Where the parties in interest assent to the correctness of an estimate of the expenses of settling the estate, the register must accept such estimate, unless there is ground for the suspicion of fraud.<sup>102</sup> Under the English law, in valuing a succession to lands vested by will in trustees, the cestui que trust cannot deduct, as "necessary outgoings," reasonable expenses of management incurred, independently of his control, by the trustees under an authority given by will.<sup>103</sup>

Pollock, C. B., said:

"It might be said that, if a man is under the absolute necessity of incurring certain expenses before he can get that which is bequeathed to him, he ought to be allowed the deduction in respect of them. But \* \* \* the crown ought not to receive less because a particular individual receives more. If one man has left him £100 a year,—the rent of a house, for example, which he can collect in the next street,—he pays upon that £100 a year. If instead of the rent being capable of collection in the next street, it is to be collected a hundred miles off, \* \* \* no deduction can be made from the value of the succession.

"The duty depends upon the value of the property, not with respect to the expenses \* \* \* in the collection, but with respect to the property itself."

In Commonwealth's Appeal<sup>104</sup> the question arose in

<sup>100</sup> In re Cullen's Estate (1891) 142 Pa. St. 18, 21 Atl. 781.

<sup>101</sup> In re Cullen's Estate, *supra*.

<sup>102</sup> In re Cullen's Estate, 8 Pa. Co. Ct. R. 234.

<sup>103</sup> In re Earl Cowley, L. R. 1 Exch. 288.

<sup>104</sup> In re Cooper's Estate, 127 Pa. St. 435, 17 Atl. 1094.

Pennsylvania as to the meaning of words requiring the tax to be imposed "on the clear value of such estates." The court said: "The appraiser was of the opinion that because the real estate descended intact to the collateral heirs the tax must be assessed upon the valuation of the real estate without abatement of the debts owing by the decedent at the time of his death. This, however, would exclude any room for the application of 'clear value,' and is inconsistent with the legislative intent in imposing the tax. This tax at first became a lien due upon the death of the decedent. His debts were then a lien against his real estate, and the law authorized the land to be sold, if necessary, for their payment. The surplus only was liable to the tax. It is to be assessed not upon the pecuniary value of the land coming to the tenant in remainder, but upon the clear value of the estate passing from the person who may die seised thereof, and the probable duration of the preceding life estate."<sup>105</sup>

The tax is imposed on what remains for distribution after the expenses of administration, debts, and rightful claims of third parties are deducted.<sup>106</sup>

### § 53. Life Estates, Annuities, Legacies, and Terms of Years.<sup>107</sup>

Under the New York statute of 1892,<sup>108</sup> where the taxable interest shall consist of an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder, or re-

<sup>105</sup> See, also, chapter 4, § 49.

<sup>106</sup> *In re Lines' Estate* (1893) 155 Pa. St. 379, 26 Atl. 728.

<sup>107</sup> Constitutional rules considered with reference to the valuation of life estates, etc., *William's Case*, 3 Bland (Md.) 186, 227.

<sup>108</sup> See, also, Laws 1887, c. 713, §§ 2, 13. And see *In re Robertson*, 5 Dem. Sur. 92; Appendix, I. e, Laws 1892, c. 399, § 11 et seq.

version, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future or contingent or limited estate, income, interest, or annuity dependent upon any life or lives in being shall be determined by the rule, method, and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities, for the determination of liabilities of life insurance companies, except that the rate of interest for computing the present value of all future and contingent interests or estates shall be 5 per centum per annum.

The superintendent of insurance<sup>109</sup> shall, on the application of any surrogate, determine the value of any such future or contingent estates, income, or interest, limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate; and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The state is thus afforded a standard and uniform method under this statute of appraising estates liable to taxation.

In Connecticut<sup>110</sup> the value of annuities and life estates is to be determined by the actuaries' combined experience tables, and 5 per centum compound interest.

<sup>109</sup> Laws 1892, c. 399, § 13.

<sup>110</sup> Appendix, VII., § 12.

The Massachusetts statute<sup>111</sup> provides that the present worth of a remainder must be ascertained by deducting the value of the life estate from the appraised value of the property, and that the value of the life estate is to be determined by actuaries' tables.

Under these provisions, where a wife left to her husband a life estate in \$10,000, not taxable, at his death to go to E., the tax upon the remainder must be computed, and deducted from the principal sum; and although the tenant for life will have lost the income on the amount so deducted, such a loss must be borne by him as legatee in remainder, and will be held to have been so intended.<sup>112</sup>

In Maryland,<sup>113</sup> where there are annuities, life estates, or remainders liable to the tax, the orphans' court is given power to determine, in its discretion, at such time as it thinks proper, the proportion of the tax a party shall pay; and its judgment is final and conclusive, but it would seem that this means only as to the valuation, and not as to any question of liability to the tax.<sup>114</sup>

In Pennsylvania<sup>115</sup> the appraisement of life estates, annuities, and terms of years is made by the official appraiser appointed by the register of wills, and he is required to make a fair and conscionable appraisement of such estates.<sup>116</sup>

But no system or rule for the purpose of ascertaining the

<sup>111</sup> Appendix, IV., Laws 1891, c. 425, §§ 2, 13.

<sup>112</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512.

<sup>113</sup> Appendix, VIII., § 115.

<sup>114</sup> *Tyson v. State*, 28 Md. 577.

<sup>115</sup> Statute, Appendix, III., § 12. Appraiser's duties defined with reference to life estates and annuities, *In re Kaas' Estate*, 45 Leg. Int. 217.

<sup>116</sup> *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106; *In re Goldstein's Estate*, 16 Phila. 319; *In re Kaas' Estate*, *supra*; *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094.

value of such estates exists in that state, and the question seems to be left entirely to the discretion of the register of wills. Generally, however, the Carlisle tables are adopted as the basis of valuation.<sup>117</sup>

Where testatrix bequeathed a specific sum in trust to invest, and, after deducting all proper costs and charges thereon, to pay the interest and income thereof to her niece for life, such a bequest presupposes a deduction of the expenses of the trust, the commissions of the trustees, and other charges which may lawfully be incurred; thus diminishing the amount to be paid the cestui qu  trust annually. These expenses are to be considered upon testimony to be submitted to the appraiser by the executor or life tenant in arriving at a fair and conscionable appraisement of the cash value of the annuity, and it is then for the appraiser to determine the probable net income of the bequest that the tax may be imposed thereon;<sup>118</sup> and though, by the terms of the will, it may become necessary to deplete the principal of the fund, to pay life annuities, making it impossible to determine the present cash value of the annuities, that fact is immaterial as regards the question of appraisement, as the property is to be taken at its "clear market value" at the testator's death.<sup>119</sup>

Where an estate for life is left to husband and wife as tenants by the entirety, and the wife is not exempt by statute, her interest, being certain and definite, and made assignable by law, and subject to partition,<sup>120</sup> is liable to as-

<sup>117</sup> *In re Goldstein's Estate*, 16 Phila. 319; *In re Kaas' Estate*, 45 Leg. Int. 217.

<sup>118</sup> *In re Kaas' Estate*, and cases cited, *supra*.

<sup>119</sup> *In re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179; *In re Johnson*, 6 Dem. Sur. 146; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394. But see *In re Clark's Estate* (Surr.) 5 N. Y. Supp. 199.

<sup>120</sup> *Laws N. Y. 1880*, c. 472.

assessment and taxation during the lifetime of the husband.<sup>121</sup>

Where there are contingent annuities,<sup>122</sup> an appraisement thereof was formerly allowed upon decedent's death,<sup>123</sup> if the value of such annuities could then be ascertained; but now, under recent decisions, they can only be appraised and taxed when the contingency occurs, and they vest in possession or enjoyment.<sup>124</sup>

So the value of a bequest to testator's widow, for life, or until she marries again, cannot be determined, for the purpose of taxation under the transfer tax law, until the termination of the widow's estate by death or marriage.

"While," said the court, "we have an established method for ascertaining the value of the life estate of a widow, based upon an arbitrary rule as to probable time of death, there is lacking any such rule to enable us to approximate the period when, if at all, she may remarry. That defies all calculation. Hence the value of her estate, or of the remainder, cannot now be ascertained, for the purpose of the assessment of the tax."<sup>125</sup>

Under the New York statutes<sup>126</sup> in existence prior to the

<sup>121</sup> *In re Higgins' Estate*, 36 N. Y. Daily Reg. 906, distinguishing *In re Le Fever*, 5 Dem. Sur. 184; *In re Hopkins*, 6 Dem. Sur. 1. But see *O'Connor v. McMahon*, 51 Hun, 66, 7 N. Y. Supp. 225. See, also, as to tenants by the entirety, *Stelz v. Schreck* (Sup.) 10 N. Y. Supp. 790; *Beach v. Hollister*, 3 Hun, 519.

<sup>122</sup> See section 54, subd. d, post.

<sup>123</sup> *In re Clark's Estate* (Surr.) 5 N. Y. Supp. 199.

<sup>124</sup> See *In re Stewart*, 131 N. Y. 274, 30 N. E. 184; *In re Benjamin*, N. Y. Daily Reg. Dec. 7, 1889, p. 906; *In re Le Fever*, 5 Dem. Sur. 184; *In re Hopkins*, 6 Dem. Sur. 1. See chapter 6, § 58, subds. c., b.; *In re Cager*, 111 N. Y. 343, 18 N. E. 866. See *In re Curtis*, 142 N. Y. 219, 36 N. E. 887; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281; *In re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>125</sup> *Coffin, S.*, *In re Millward* (Surr.; 1894) 27 N. Y. Supp. 288.

<sup>126</sup> Appendix, I. a, Laws 1887, c. 713.

act of 1892, a legacy which might be valued at less than \$500 was exempt, the word "estate," in the acts, being held to mean the property passing to the legatee, and not the estate of the testator.<sup>127</sup> Under this clause of the statute of 1887, it was held that a cash legacy of \$500, which is not legally payable until a year after decedent's death, is appraisable and taxable at its full value, notwithstanding the executor has a year in which to pay it.<sup>128</sup>

In holding that this fact did not prevent the assessment and taxation of such legacy, at its full value at the time of death, Surrogate Ransom<sup>129</sup> said: "Thus we have seen that the legislature plainly distinguished between a moneyed legacy and one of other property, and find authority for the construction which has been given to this act by me in several cases heretofore,—that a moneyed legacy need not be appraised. In fact, the meaning of the act itself is an appraisement by the legislature of a moneyed legacy at its face value at the date of decedent's death. Legacies of property, not in money, are to be appraised at their fair, clear market value as of the date of decedent's death, not as of one year thereafter, when the legacy is payable and its delivery may be enforced. It is said that the fair, clear, market value of the property subject to the tax is what it will be worth when the legatee is entitled to receive it and may compel its delivery to him. This construction of the

<sup>127</sup> *In re Cager's Will*, supra; *In re Howe*, 112 N. Y. 100, 19 N. E. 513; *In re Sherwell's Estate*, 125 N. Y. 376, 26 N. E. 464; *In re Sterling's Estate* (Surr.) 30 N. Y. Supp. 386. The words "estate" and "property," under the acts of 1892, now refer to the aggregate estate of the decedent, and not to the share of the legatee. *In re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311; *In re Hall*, 34 N. Y. Supp. 616; chapter 3, § 41.

<sup>128</sup> *In re Pond*, N. Y. Daily Reg. May 25, 1889; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895; *In re McGowan's Estate*, 3 N. Y. Law J. 888. Contra, *In re Peck's Estate* (Surr.) 9 N. Y. Supp. 465.

<sup>129</sup> *In re Bird*, supra.

act works its repeal. Moreover, it is contrary to its very letter. The soundness of this proposition is shown by a consideration of the rights of parties in case of property other than money, which had appreciated in value since decedent's death; for instance, stocks." The rule that such \$500 legacies are taxable at their face value is now settled under the act of 1887.<sup>130</sup>

In Pennsylvania, as we have already seen, an "estate" of less than \$250 is exempt,<sup>131</sup> but under this provision of the statute, where the aggregate estate of the testator exceeds \$250, and there are legacies of less than that amount, they are appraisable and taxable,<sup>132</sup> upon the theory that the word "estate" refers to the general property of the decedent, and not to the interest of the legatee, a result which was contrary to the construction placed upon a similar clause in the New York statute of 1887,<sup>133</sup> but now, under the New York act of 1892,<sup>134</sup> it is held that the words "estate" and "property," used in the act, refer to the general estate of the testator, and not to specific legacies or shares; and where the devise is to lineal heirs, and the estate is over \$10,000 in value, and personalty, it is taxable, whether the share of the legatee is more or less.<sup>135</sup> The same rule is applied where the legacy is to collateral heirs, and the estate of decedent is of the value of \$500 or more; the share of the legatee is taxable though of less value than the sum of \$500.<sup>136</sup>

As a general rule, legacies given in payment for services

<sup>130</sup> *In re Sherwell's Estate*, 125 N. Y. 376, 26 N. E. 464.

<sup>131</sup> Chapter 3, § 41.

<sup>132</sup> *Com. v. Boyle*, 2 Del. Co. Rep. 335.

<sup>133</sup> Chapter 3 § 41.

<sup>134</sup> Appendix, I.

<sup>135</sup> *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311.

<sup>136</sup> Laws 1892, c. 399, § 22; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989.



rendered, or for just debts owing by the decedent, are not appraisable, as they are not liable to taxation.<sup>137</sup> The fact that a legacy has not been paid, or its payment demanded, by the legatee, does not prevent its appraisement where there is no proof that the legacy has been renounced.<sup>138</sup>

## § 54. Remainders, Contingent, and Future Estates.

### (a) *Under Acts of Congress.*

Under the acts of congress in force until 1870, the right to appraise or tax contingent estates or remainders did not accrue until such estates vested in the actual possession and enjoyment of the tenant in remainder.<sup>139</sup>

### (b) *Maryland and Connecticut.*

By the Maryland statute <sup>140</sup> the court having jurisdiction over the collateral inheritance tax is empowered, in its discretion, and at such time as it shall think proper, to determine what proportion the party entitled to the contingent interest shall pay of the tax, and its judgment is to be final and conclusive. Such court is also empowered to determine, in its discretion, from time to time, after the determination of the preceding estate, and, as the remainder of said estate shall vest in the party entitled in remainder or reversion, what proportion of the residue of the tax shall be paid by such parties in whom the estate shall so vest.

<sup>137</sup> *In re Rielly's Estate*, 3 N. Y. Law J. 796. See *In re Doty's Estate* (Surr.) 27 N. Y. Supp. 653; *In re Sidell*, N. Y. Law J. March 9, 1893; *In re Meyer* (May 26, 1891) 5 N. Y. Law J. 532; *In re Hulse* (Surr.) 15 N. Y. Supp. 770; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989; chapter 4, § 49; chapter 6, § 61.

<sup>138</sup> *In re Raymond*, 12 N. Y. Law J. 453.

<sup>139</sup> See chapter 6, § 58b; *Wright v. Blakeslee*, 101 U. S. 174; *Clapp v. Mason*, 94 U. S. 589; *Mason v. Sargent*, 104 U. S. 689; *U. S. v. Hazard*, 8 Fed. 280; *U. S. v. Brice*, *Id.* 381.

<sup>140</sup> Appendix, VIII., § 115.

The clause of the statute which declares that the judgment of the orphans' court shall be final and conclusive applies only to the proportion of the tax which it is the duty of the said court to assess among the parties interested in the estate.<sup>141</sup>

In Connecticut the value of such contingent interest is ascertainable by the actuaries' combined experience tables and 5 per cent. compound interest.<sup>142</sup>

(c) *Pennsylvania Statute.*

By the statute of this state,<sup>143</sup> now in force, it is provided that in all cases where there has been or shall be a devise, descent, or bequest to collateral relatives or strangers liable to the collateral inheritance tax to take effect in possession or coming into the actual enjoyment after the expiration of one or more life estates or a period of years, the tax on such estate shall not be payable, or interest begin to run, until the person or persons liable for the same shall come into actual possession of such estate by determination of the estate for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner as aforesaid; provided, that the owner shall have the right to pay the tax at any time prior to his coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax after deducting the value of the life estate or estate for years; and provided further, that the tax on real estate shall remain a lien on the real estate upon which the same is chargeable until paid,<sup>144</sup> and the owner of any

<sup>141</sup> *Tyson v. State*, 54 Md. 577.

<sup>142</sup> Appendix, III., § 12.

<sup>143</sup> Laws Pa. 1887, Appendix, III., § 3.

<sup>144</sup> The clause in the statute relating to the lien has been declared unconstitutional, or at least inoperative so far as foreign real estate is concerned. See *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; also chapter 2, § 15. See, also, as to lien, chapter 8, § 67.

personal estates shall make a full return of the same to the register of wills in the proper county within one year from the death of the decedent, and within that time enter into security for the payment of the tax to the satisfaction of such register; and, in case of failure so to do, the tax shall be immediately payable and collectible.

By further provision <sup>145</sup> it is made the duty of the register of wills in the county in which letters testamentary or of administration are granted to appoint an appraiser as often as, and whenever, occasion may require, to fix the valuation of estates which are or shall be subject to collateral inheritance tax, and it shall be the duty of such appraiser to make a fair and conscionable appraisement of such estates.

This statute fails, however, to provide any standard for determining the value of contingent interests or remainders, and, as under the old law, the method of valuation seems to be left to the arbitrary discretion of the register of wills in each county. As we have seen, the Carlisle tables are the guide commonly in use.<sup>146</sup>

The portions of the early statutes of Pennsylvania <sup>147</sup> concerning estates in remainder, and the appraisement thereof, are referred to in the notes.<sup>148</sup> They are of more or less value in arriving at an understanding of the condition of the law of that state with reference to the appraisement and taxation of estates in remainder,<sup>149</sup> because, while the law

<sup>145</sup> Section 12, Pennsylvania Statute, Appendix.

<sup>146</sup> Goldstein's Estate, 16 Phila. 319; Kaas' Estate, 45 Leg. Int. 217.

<sup>147</sup> See Del Busto's Estate, 23 Wkly. Notes Cas. 111, where these statutes are collated and explained, per Penrose, J.; Mellon's Appeal, 114 Pa. St. 572, 8 Atl. 183.

<sup>148</sup> For act of 1826, see chapter 6, § 58, subd. d.

<sup>149</sup> See 1 Purd. Dig. (10th Ed.) 215, 216. By Laws 1849, p. 579, § 13, it was provided: "Where any person or persons shall bequeath or devise any estate, real or personal, to a father, widow or other

since the act of 1826 has undergone considerable modification with reference to the taxation of remainders and contingent estates, so far as the act of 1887 is concerned, it has been expressly adjudged that that statute is, at most, but a mere codification of the former statutes and decisions of the supreme court; and, so far as it has been construed, it has been held to make little, if any substantial, change in the prior laws. How far this is so, as regards matters relating to the appraisement, remains to be determined.<sup>150</sup>

person during life, and the remainder over to collateral heirs at their decease, immediately after the death of the testator, the estate so granted shall be appraised in the manner hereinbefore provided, and after deducting the valuation of said life-estate the collateral inheritance tax on the remainder shall be immediately due and payable over to the register of wills of the proper county," etc. By Laws 1850, p. 170, § 1, it was provided that "in all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers liable to the collateral inheritance tax, to take effect in possession or to come into actual enjoyment after the expiration of one or more life-estates or period of years, it shall and may be lawful for the parties so liable for such tax to elect to wait their coming into the actual possession of the estate or property subject to the said tax and in such case shall give security to the register of the proper county for the payment thereof on the personal estate at such period as they or their representatives may come into possession, together with six per cent. per annum interest on the amount of the tax from the time the same accrues until paid, provided that such persons shall make a full return of such property within one year from the date thereof or within one year from the death of the decedent and within that period enter into such security to the satisfaction of the register," etc. By Act 1855, p. 425, § 1, it was provided that "the penalty of interest shall only run from the time remainderman comes into possession \* \* \* and if such legatee or devisee shall elect to pay said tax in anticipation of the same coming into actual possession and enjoyment, the same shall be received at the then valuation of the legacy or devise, deducting the value of the life-estate or term of years."

<sup>150</sup> See *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *In re*

The adjudications which from time to time have been made under these statutes, with reference to the appraisement of estates in remainder, may be best stated in the following order. How far the authorities conflict, the writer does not pretend to say:

(1) Under the early statutes in force prior to 1850,<sup>151</sup> estates in remainder, contingent or otherwise, were appraisable immediately upon decedent's death, and, after deducting the value of the life estate, the tax was due and payable to the register of wills.<sup>152</sup>

The object of the act of 1849 was to give a mode of making the appraisement.<sup>153</sup>

But, in order to be appraisable at decedent's death, the value of such estates, it seems, must then have been ascertainable; otherwise the register could make no appraisement of the estate in remainder.<sup>154</sup>

The tax accrues at decedent's death, unless enjoyment is postponed by a life estate in another; and, except in such case, the value at the time of death is the basis for calculating the amount of the tax.<sup>155</sup>

Where such estates were appraisable at decedent's death, so that the tax could be imposed upon the ascertained value of the estate, the statute of limitations then became opera-

Fagely's Estate, 128 Pa. St. 603, 18 Atl. 386; *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111.

<sup>151</sup> 1 Purd. Dig. (10th Ed.) 215.

<sup>152</sup> *Com. v. Smith*, 20 Pa. St. 100; *Com. v. Eckert*, 53 Pa. St. 102; *Mellon's Appeal*, 114 Pa. St. 570, 8 Atl. 183; *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *In re Fagely's Estate*, 128 Pa. St. 603, 18 Atl. 386; *In re Willing's Estate*, 2 Wkly. Notes Cas. 307; *James' Appeal* (1887) 2 Del. Co. Rep. 164.

<sup>153</sup> *James' Appeal* and *Com. v. Smith*, *supra*.

<sup>154</sup> See *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900; *Mellon's Appeal*, *supra*, 574; see *In re Cager*, 111 N. Y. 343, 18 N. E. 866.

<sup>155</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.

tive against the commonwealth,<sup>156</sup> in favor of purchasers of real estate upon which the tax was a lien.<sup>157</sup>

Estates in remainder, or contingent estates, were likewise subject to appraisal and taxation at the decedent's death, under the North Carolina statute.<sup>158</sup>

In Pennsylvania, however, the taxation of such estates before they vested in actual possession and enjoyment, and by which accrued interest, and often heavy penalties, in the nature of additional interest, was charged, became oppressive, and was felt to be unjust,<sup>159</sup> and was so declared in the preamble to one of the amendatory acts.<sup>160</sup>

(2) As a result of this condition of the law, two remedial statutes were passed,—one in 1850,<sup>161</sup> and the other in 1855.<sup>162</sup>

By the former, tenant in remainder was given the election to await his coming into the possession and enjoyment of his estate before paying the tax, in which case he was to give security for the payment of the tax to the register. It would seem, however, that this statute simply delayed payment of the tax, and did not interfere with the appraisal of such estate on decedent's death.

By the act of 1855 it was provided that, if such remaindermen elected to pay the tax in anticipation, "such tax was to be received at the then valuation of the legacy or devise, deducting the value of the life estate or term of years."

We have referred to these statutes, in this connection, merely in so far as they relate to the question of appraisal. Now, while it is evident that remaindermen were

<sup>156</sup> Mellon's Appeal, *supra*.

<sup>157</sup> James' Appeal, 2 Del. Co. Rep. 164; *In re Cullen's Estate*, 26 Wkly. Notes Cas. 216.

<sup>158</sup> Attorney General v. Pierce, 6 Jones, Eq. 240.

<sup>159</sup> Mellon's Appeal, *supra*.

<sup>160</sup> P. L. 1850, p. 170.

<sup>161</sup> *Supra*.

<sup>162</sup> P. L. 1855, p. 425.

relieved from the payment of the tax at the decedent's death, and from onerous interest charges, it was nevertheless held that the tax still accrued at decedent's death, so far as the rights of purchasers were concerned, so as to bar the right of the commonwealth to begin any proceeding, after the expiration of 20 years from decedent's death, to enforce the statutory lien.<sup>163</sup>

It was suggested, however, before the decision in Mellon's Appeal, that the object and intent of the statute of 1855 was not only to delay the payment until the tenant in remainder came into possession, but also that the valuation of his estate should be made at that time, thus giving him the option of waiting until the value of his estate could be accurately ascertained before it could be appraised.<sup>164</sup>

Again, where decedent died, and the tax was payable, before the passage of the act of 1855, but none was imposed, and the life tenant did not die until 1875, it was held that under the act of 1855 the tax was not payable until the estate vested in possession or enjoyment, but it continued a lien, and should be appraised as of the date of decedent's death.<sup>165</sup>

In 1886 the question of appraisement of remainders came before the supreme court for consideration. "As previously provided for," said Sterrit, J.,<sup>166</sup> "the tax accrues upon the devolution of the estate that is subject thereto; and the law contemplates an appraisement as of that date, not only for the purpose of ascertaining the tax on estates that vest in possession and enjoyment, but also for the purpose of deter-

<sup>163</sup> See Mellon's Appeal (1886) 114 Pa. St. 571, 372, 8 Atl. 183, and cases cited *supra*.

<sup>164</sup> McGeary's Estate (1883) 14 Pa. Law J. (N. S.) 174.

<sup>165</sup> James' Appeal (1877) 2 Del. Co. Rep. 164; *In re Cullen's Estate*, 26 Wkly. Notes Cas. 216.

<sup>166</sup> Mellon's Appeal, 114 Pa. St. 572, 8 Atl. 183.

mining the amount of the tax to be paid on those whose actual possession and enjoyment are deferred until the expiration of the intervening estate or term of years. \* \* \* There was nothing to have prevented him [the register] from causing an appraisement of that interest and of the life estate to be made; thereby ascertaining the value of the estate in remainder, \* \* \* and thus fixing the amount of the collateral inheritance tax. In the meantime the remainderman would have had a right to anticipate payment, and thus satisfy the lien by paying the tax and accrued interest thereon." In Mellon's Appeal,<sup>167</sup> however, no administration of the estate seems ever to have been had, and there was no election upon the part of the remainder-men to pay the tax when the estate vested in possession. The case would seem, however, to conflict with the earlier cases cited, and serves to show that the right to an immediate appraisement on the part of the commonwealth was not taken away by the act of 1855.

Whether the rule as thus announced with respect to the appraisement of estates in remainder has been modified or changed by the recent statute of 1887 remains to be determined.

After postponing the payment of the tax until the estate vests in possession, the statute now provides that the tax shall be assessed upon the value of the estate "at the time the right of possession accrues to the owner as aforesaid." This provision does not seem to be contained in the earlier statutes, and is therefore new. If the right of possession accrues "as aforesaid" (that is, at the time the estate actually vests in possession and enjoyment, and not upon decedent's death), then the manifest intention of the legislature would appear to be to postpone both the appraisement and the payment of the tax until the remainder-man comes

<sup>167</sup> Supra.



into possession.<sup>168</sup> If, therefore, the bond required by the statute is filed within the year, the state would seem to lose the right to an immediate appraisement of estates in remainder, and to this extent the ruling in *Mellon's Appeal*<sup>169</sup> would appear to be modified. While the question was not presented, this view seems to be confirmed by the recent case of *Commonwealth's Appeal*,<sup>170</sup> where, in speaking of this portion of the act, the court said: "Where, therefore, the act declares that the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner, or that the tax shall be assessed on the value of the estate at the time of the payment of the tax, it refers to the then quantum of the estate, and not to the value of the land, which may be a very different estate from that which passed from the decedent."

But the act declares,<sup>171</sup> in case of failure to file the bond within one year from decedent's death, the tax shall be immediately payable and collectible. It would seem that where such failure occurred it would afford strong evidence that the remainder-man declined to elect to await the possession, and the commonwealth would seem to have the right to an appraisement,<sup>172</sup> although there does not appear to be any provision of the statute providing for an appraisement in such event. An appraiser, however, may be appointed as often as and whenever occasion may require, and under this clause it would appear that an appraisement by the register could be had in such a case

(3) But while the state does not now seem to be entitled to a compulsory appraisement of estates in remainder, un-

<sup>168</sup> *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174; *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.

<sup>169</sup> *Supra*.

<sup>170</sup> *In re Cooper's Estate*, 127 Pa. St. 435, 441, 17 Atl. 1094.

<sup>171</sup> Section 3.

<sup>172</sup> See *In re Willing's Estate*, 2 Wkly. Notes Cas. 307.

der the act of 1887, until the estate vests in possession or enjoyment, the remainder-man is given the privilege or election of anticipating payment of the tax, and thus has an immediate right to an appraisement of his interest in remainder:

(a) Under the act of 1855, where the legatee or devisee elected to anticipate payment of the tax, the statute directed that the same should be received at the then valuation of the legacy or devise, deducting the value of the life estate or term of years.

(b) Under the act of 1887 the owner shall have the right to pay the tax at any time prior to his coming into possession, and the tax shall be assessed on the value of the estate at the time of payment of the tax, after deducting the value of the life estate or estate for years.

These two enactments seem to be substantially of the same purport, though couched in somewhat different language.

What is meant by the "then valuation of the legacy or devise," under the act of 1855, has been declared to be its value as of the date it vested,—the death of the decedent; and the valuation of the estate in remainder is to be ascertained by deducting the value of the life estate or term of years from the value of the entire estate.<sup>173</sup>

Under this act, if tenant in remainder elected, in anticipation, to pay at the death of the decedent, the tax was appraisable on the then valuation of the entire estate, less the value of the estate for life or years; that is, when the tenant of the intermediate estate was not liable, the tenant in remainder had the election either to pay tax on the entire estate, with interest, when he came into actual possession, or to pay at the death of the decedent on the then net valuation of the estate in remainder; and, in consideration of

<sup>173</sup> Mellon's Appeal, 114 Pa. St. 572, 8 Atl. 183.

such anticipated payment, her right to the tax on the intermediate estate was held to be waived by the commonwealth.<sup>174</sup>

So, under the act of 1887, if tenant in remainder desires to pay the tax at any time prior to his coming to the possession, it is to be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or term of years. The value of the estate of the remainder-man depends upon the clear value of the estate passing from the person who died seised, and the probable duration of the preceding life estate.

If the life tenant is old, or his estate has already been enjoyed for a number of years, the tenant in remainder will not be kept out of his interest so long as otherwise, and the value of the estate will be greater.<sup>175</sup>

And, as we have already seen,<sup>176</sup> in estimating the clear value of the estate in remainder outstanding debts and obligations owing by decedent at the time of his death must be taken into consideration, for they are a lien against his real estate, to satisfy which the land may be sold; hence the surplus or net value of the remainder only is liable to taxation.<sup>177</sup>

The method of assessing the collateral inheritance tax is to take the inventory and appraisement of the decedent's estate as filed within 30 days after his death, or a new appraisement is made by the state appraiser, and after deduct-

<sup>174</sup> *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *In re Willing's Estate* (1876) 2 Wkly. Notes Cas. 307; *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174.

<sup>175</sup> *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *Mellon's Appeal*, 114 Pa. St. 564, 8 Atl. 183.

<sup>176</sup> *Supra*, § 52, c. 4, § 49.

<sup>177</sup> *In re Cooper's Estate*, *supra*, 440; *Com. v. Freedley*, 21 Pa. St. 33.

ing therefrom the debts and liabilities of the decedent, and the expense of settling his estate, to impose the tax upon the balance remaining.<sup>178</sup>

Where payment of the tax is made after the possession accrues, the remainder is to be valued as of the date of possession.<sup>179</sup> And this is so whether the remainder arises by formal bequest, or by operation of law.<sup>180</sup>

(4) Under a recent ruling in Pennsylvania, it has been held<sup>181</sup> that where the life tenant (a widow) has a power of disposition of the corpus of the estate during life, and there is a bequest to collaterals of the surplus that shall remain after her death, no tax can be imposed upon the residuum until her death, as it is impossible to ascertain its

<sup>178</sup> Williamson's Estate, 49 Leg. Int. 106.

<sup>179</sup> In re Cooper's Estate, 127 Pa. St. 435, 17 Atl. 1094. See Mellon's Appeal, 114 Pa. St. 572, 8 Atl. 183.

<sup>180</sup> In re McGeary's Estate, 14 Pa. Law J. (N. S.) 174, citing Big Black Creek Imp. Co. v. Com., 94 Pa. St. 453. It would appear to be to the advantage of the remainder-man to anticipate payment of the tax instead of paying it at the time the estate vests in possession. This appears from the method which I am informed is adopted by the registers in Pennsylvania in assessing and taxing estates in remainder. For instance, if there is a devise of real estate worth \$5,000, subject to a life estate, and at the death of the testator the life tenant was 60 years old, reference to the Carlisle Table will give figure 8,304, the product of which, multiplied by 5 per cent. (the rate directed by the court to be used by the register for this purpose) of \$5,000 (\$250), gives the value of the life estate, viz. \$2,076, the value of the remainder being the difference between that amount and \$5,000, viz. \$2,924. The life tenant would therefore have to pay the tax upon \$2,076, and, if the remainder-man wished to pay tax immediately, he would have to pay it upon \$2,924 only, but, if he did not pay the tax until the remainder vested,—and he cannot be compelled to pay it before that time,—he would have to pay it upon \$5,000. The practice under the old acts was to pay the tax annually upon the yearly value of the estate.

<sup>181</sup> In re Nieman's Estate, 131 Pa. St. 346, 18 Atl. 900. See Mellon's Appeal, supra.

amount or value, if any, until that time. The same result has been reached in New York.<sup>182</sup>

But where the widow has such power of disposition, and a valid trust is created of the residue for charitable purposes, it seems, the value of the life tenant's interest, and of the amount necessary for her support, being ascertainable by evidence, a tax may be imposed upon such residue.<sup>183</sup>

(d) *New York*.<sup>184</sup>

(1) *Provisions of Act of 1892.*

In this state the method of appraisement and taxation of remainder and future estates, contingent or otherwise, is now regulated by the transfer tax act of 1892,<sup>185</sup> repealing the former act of 1887.

The statute now provides<sup>186</sup> that if the property upon the transfer of which a tax is imposed shall be an estate, income, or interest for a term of years or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained

<sup>182</sup> In re Cager, 111 N. Y. 343, 18 N. E. 866. See cases discussed, subdivision a, post.

<sup>183</sup> In re Brewer's Estate, 15 Pa. Law. J. (N. S.) 433, 435; 16 Pa. Law J. (N. S.) 114.

<sup>184</sup> For the law of appraisements of remainders and future estates under the statutes of other states, see statutes, Appendix.

<sup>185</sup> Appendix, I. e, Laws 1892, c. 399, §§ 11, 13. For act of 1887, c. 713, §§ 2, 13, see Appendix, I. a. See, also, chapter 6, § 3, subd. 3.

<sup>186</sup> Laws 1892, c. 399, § 11.

at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future or contingent or limited estate, income, interest, or annuity dependent upon any life or lives in being shall be determined by the rule,<sup>187</sup> method, and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for computing the present value of all future and contingent interests or estates shall be 5 per centum per annum. The statute further provides<sup>188</sup> that the superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income, or interest limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. It also provides<sup>189</sup> that all taxes imposed shall be due and payable at the time of the transfer: provided, however, that taxes upon the transfer of any estate, property, or interest therein, limited, conditioned, dependent, or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.<sup>190</sup>

<sup>187</sup> Prior to 1887, the Northampton Tables were followed. In re Robertson, 5 Dem. Sur. 92.

<sup>188</sup> Laws 1892, c. 399, § 13.

<sup>189</sup> Laws 1892, c. 399, § 3.

<sup>190</sup> See, also, section 22, providing that the word "transfer," as used in this act, shall be taken to include the passing of property or

Section 11 of the statute of 1892, as originally enacted in 1885, and continued in 1887, was, it seems, taken from the early statutes of Pennsylvania in existence prior to 1855.<sup>191</sup> Under the statutes of 1885 and 1887, although now repealed, the decisions are of use, inasmuch as the same statutory provisions are continued substantially in the act of 1892, with, as we have seen, some important additions regulating the assessment and taxation of contingent and future estates. It was adjudged under the acts of 1885 and 1887 as follows:

(a) *Vested Estates and Remainders.*

(1) Vested remainders or estates,<sup>192</sup> limited upon life estates or terms of years, are appraisable immediately upon the death of the decedent.<sup>193</sup>

(b) *Contingent Estates—When not Appraisable at Death.*

(2) But where, from the nature of the estate given to the life tenant or first taker, it is impossible at decedent's death to ascertain the fair market value of the estate in remainder or future estate until the death of the life tenant, no appraisement of such ultimate devise can be made at decedent's death, nor until the estate vest in the actual possession or enjoyment of the beneficiary.<sup>194</sup> The statute of

any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, etc.

<sup>191</sup> See *supra*, p. 237, note.

<sup>192</sup> See a valuable note on "Vesting" in 18 Abb. N. C. 300 (referred to in *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 966), and in chapter 6, § 58, subds. c., 3a, "Vested Estates." See, also, on the subject of vesting, *In re Curtis' Estate*, 73 Hun, 185, 25 N. Y. Supp. 909; *Id.*, 142 N. Y. 219, 36 N. E. 887; *In re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311; *In re Stiles' Estate* (Surr.) 3 N. Y. Supp. 137.

<sup>193</sup> *In re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517; *In re Stanford*, 9 N. Y. Law J. 327; *In re Le Fever*, 5 Dem. Sur. 184; *In re Cogswell*, 4 Dem. Sur. 248; *In re Higgins*, 36 N. Y. Daily Reg. 906; *In re Hopkins*, 6 Dem. Sur. 1; *In re Van Rensselaer*, N. Y. Law J. May 28, 1889; *In re Ferrer*, N. Y. Law J. Jan. 30, 1892, p. 1062.

<sup>194</sup> *In re Cager's Will*, 111 N. Y. 342, 18 N. E. 866. See *In re* (245)

1892 \* now provides that where the estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained at the time of the transfer, it shall be appraised at the time when such value first became ascertainable;<sup>195</sup> that taxes upon any estate or interest dependent or determinable upon any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into the actual possession or enjoyment thereof.

The leading case in New York on this subject under the act of 1885 is that of *Cager*,<sup>196</sup> where the rule and method of valuation of such estates was stated by Ruger, C. J., as follows: "When the question as to whether any property at all shall pass under the limitation over, and, if so, how

*Curtis*, 142 N. Y. 219, 36 N. E. 887, affirming 73 Hun, 185, 25 N. Y. Supp. 909; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281, affirming 76 Hun, 257, 27 N. Y. Supp. 741; *In re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311; *Id.*, 76 Hun, 399, 27 N. Y. Supp. 1086; *In re Wheeler's Estate (Surr.)* 22 N. Y. Supp. 1075; *In re Wallace's Estate (Surr.)* 4 N. Y. Supp. 465, 466, citing *In re Bruce; Talmadge v. Seaman (Sup.)* 32 N. Y. Supp. 906. Form of orders in such cases given. *In re Clark's Estate (Surr.)* 5 N. Y. Supp. 199; *In re Le Fever*, 5 Dem. Sur. 184, distinguishing *In re Cogswell*, *supra*; *In re Benjamin*, 36 N. Y. Daily Reg. 906; *In re Hopkins*, 6 Dem. Sur. 1; *In re Higgins*, *supra*; *In re Fleming's Estate*, N. Y. Law J. Oct. 15, 1889; *In re Matthews' Estate*, N. Y. Law J. July 27, 1889; *In re Bennet's Estate*, N. Y. Law J. March 4, 1889, p. 1814; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184; *Id. (Surr.)* 10 N. Y. Supp. 15; *In re Leavitt's Estate (Surr.)* 4 N. Y. Supp. 179. See *Mellon's Appeal*, 114 Pa. St. 573, 574, 8 Atl. 183; *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900; *In re Brewer's Estate*, 15 Pa. Law J. (N. S.) 433, 16 Pa. Law J. (N. S.) 114.

\* Laws 1892, c. 399, § 11.

<sup>195</sup> Laws 1892, c. 399, § 3.

<sup>196</sup> 111 N. Y. 343, 18 N. E. 866.



much, depends upon the will of the first taker, we are unable to see any rule by which such value can be determined. In such a case there is no basis upon which the value of the devise can be appraised, and no foundation for the imposition of any tax, and the provision for the giving of the conditional bond therefor is wholly inapplicable.”

In order that the tax may be imposed immediately upon the death of the decedent, two things are necessary: First, to determine definitely the fair market value of the property subject to the tax; and, second, the person to whom such property passes.<sup>197</sup>

Where, therefore, there is a bequest to an exempt person for life, with a limited power of disposition over the corpus of the estate given to the life tenant, and with remainder over after his death of what shall remain, such remainder is not appraisable, as it is impossible to ascertain its value, if any, until the death of the life tenant, as the latter may use and dispose of the whole estate during his lifetime.<sup>198</sup>

Under this rule, application for the appointment of an appraiser will be denied where the persons among whom the estate is to be divided on the death of the life tenant, or the shares to which the legatees will be then entitled, cannot be ascertained until such life tenant's death.<sup>199</sup> The same doctrine, as we have seen, has been recently announced in Pennsylvania.<sup>200</sup> But it seems when the amount necessary for the life tenant—a widow—can be ascertained and

<sup>197</sup> *In re Clark* (Surr.) 5 N. Y. Supp. 199.

<sup>198</sup> *In re Cager*, 111 N. Y. 343, 18 N. E. 866; *In re Hopkins*, 6 Dem. Sur. 1; *In re Fleming*, N. Y. Law J. Oct. 15, 1889, and cases cited *supra*; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900. But see *In re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179; *In re Brewer's Estate*, 15 Pa. Law J. (N. S.) 433, 16 Pa. Law J. (N. S.) 114.

<sup>199</sup> *In re Benjamin*, 36 N. Y. Daily Reg. 906; *In re Stewart* (Surr.) 10 N. Y. Supp. 15; *Id.*, 131 N. Y. 274, 30 N. E. 184; *In re Millward's Estate* (1894) 6 Misc. Rep. 425, 27 N. Y. Supp. 286.

<sup>200</sup> *In re Nieman's Estate*, *supra*.

fixed, and there is a valid trust in remainder to charitable uses, although she may have a limited power of disposition, a tax is assessable upon the remainder-men.<sup>201</sup>

(c) *May be Appraised on Vesting.*

(3) But where no appraisement can be had at decedent's death, and the contingent estate or remainder subsequently, on the death of the life tenant, actually vests in possession or enjoyment in a taxable heir or legatee, an appraisement will then be allowed, and the tax imposed. Thus the act of 1892 now provides.<sup>202</sup>

In *Re Cager* <sup>203</sup> it was held that where the present value of property which is devised to one with a limitation over to others upon the happening of some event which may or may not occur can be ascertained, then a ground upon which an approximate estimate of the value of the ultimate devise appears, and it may be made. In such a case the act enables a tax to be imposed and collected upon the ulterior devises through the medium of a bond to be given by the respective legatees when they come into possession of the devised property.

In cases of this character it was said in the *Cager Case* that it was possible that no appraisement could be had afterwards, if not allowed at the death of the decedent. This view of the law would seem, however, to be obiter dicta,<sup>204</sup>

<sup>201</sup> In *re Brewer's Estate*, *supra*.

<sup>202</sup> Laws 1892, c. 399, §§ 3, 11, 13; In *re Wallace* (Surr.) 4 N. Y. Supp. 465, 466, citing In *re Bruce*, *supra*; In *re Clark* (Surr.) 5 N. Y. Supp. 199; In *re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179; In *re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900; In *re Stewart*, *supra*, distinguishing In *re Cager*, 111 N. Y. 350, 18 N. E. 866. See In *re Curtis*, 142 N. Y. 219, 36 N. E. 887; In *re Roosevelt*, 143 N. Y. 120, 38 N. E. 281; In *re Hoffman*, 143 N. Y. 330, 38 N. E. 311; *Talmadge v. Seaman* (Sup.) 32 N. Y. Supp. 906, 85 Hun, 242, reversed as In *re Scaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>203</sup> 111 N. Y. 343, 18 N. E. 866.

<sup>204</sup> See In *re Stewart* (Surr.) 10 N. Y. Supp. 15; *Id.* 131 N. Y. 274, 30 N. E. 184; In *re Nieman's Estate* and cases cited *supra*.

and the provision of the statute allowing an appraiser to be appointed as often as and whenever occasion may require was evidently overlooked.<sup>205</sup> As will be seen, this clause of the act of 1892 is now much broader.\*

The intention of this clause must be to meet such cases in which no appraisement can be had upon decedent's death;<sup>206</sup> otherwise many estates fully within the intention of the act would escape taxation.

In *Re Vassar*<sup>207</sup> the court said, in referring to life and future estates under the act of 1887, that its provisions indicated the legislative intent as requiring the appraisal to be made immediately after the death of the decedent, and that the property should be appraised as soon after death as practicable.

In *Re Stewart*<sup>208</sup> a power of appointment was conferred upon the trustee by will, authorizing him to convey the property described in the power to certain persons, with a discretion as to the appointees. Four years afterwards he conveyed to certain of the legatees who were not exempt, and, in holding the property passing to them liable to the tax, Ransom, S., said: "It is true that at the date of the death of Mrs. Stewart the appraiser could not determine either the value of the estate which might eventually become taxable, or the persons to whom it would pass; and he could not, therefore, make any appraisal. It has been the practice of this court to suspend all proceedings as to such contingent estates until such contingencies happen, with a view to the

<sup>205</sup> Appendix, I. e, Laws 1892, c. 399, § 13.

\* Chapter 399, § 11.

<sup>206</sup> See *Com. v. Freedley*, 21 Pa. St. 33; section 54 d c.

<sup>207</sup> 127 N. Y. 1, 27 N. E. 394.

<sup>208</sup> 10 N. Y. Supp. 15 (Surr.), and 131 N. Y. 274, 30 N. E. 184. See, also, *In re Purroy*, 7 N. Y. Law J. May 6, 1892, 344; *In re Cunningham*, 7 N. Y. Law J. July 21, 1892, 954, and *In re Stanford*, N. Y. Law J. May 6, 1893.

appointment of an appraiser at that time to make the appraisement.<sup>209</sup> \* \* \* The claim that at the death of this decedent there was no estate that could be held subject to the tax, and that, therefore, there could be no tax assessed now, cannot be sustained. It is a well-settled principle of the law that where parties take under a power of appointment they take under the instrument creating the power, so that the parties named by H. under the power given him must be regarded as the persons selected by Mrs. Stewart." These views were sustained by the court of appeals,<sup>210</sup> holding that although the property was not appraisable at decedent's death, under the act of 1885, it became both appraisable and taxable when the power of appointment was exercised by the trustee.

In *Re Curtis*<sup>211</sup> the question of the appraisement or valuation of contingent interests at death of the testator was discussed, but not decided. The will of decedent created trusts for life for the benefit of two daughters and two grandchildren, with remainders to such of her nephews and nieces named, living at the time of the successive termination of each trust, and if any of them should then be dead, leaving issue, to such issue. The surrogate, basing his opinion upon *In re Stewart*,<sup>212</sup> held that the remainders were both immediately assessable and taxable. In holding, under the act of 1885, that the remainders were not taxable until the successive termination of each trust, for the reason it could not then be determined whether the property would

<sup>209</sup> Citing *In re Wallace* and *In re Clark*, *supra*, note 202. See *In re Stanford*, N. Y. Law J. May 6, 1893.

<sup>210</sup> *In re Stewart* (1892) 131 N. Y. 274, 30 N. E. 184. See the subject of powers discussed in this case and in *Re Johnson*, N. Y. Law J. June 17, 1892.

<sup>211</sup> (1894) 142 N. Y. 219, 38 N. E. 887, affirming 73 Hun, 185, 25 N. Y. Supp. 909.

<sup>212</sup> *In re Stewart*, 131 N. Y. 277, 30 N. E. 184.

pass to taxable persons, or to exempt persons, Finch, J., said:

"The surrogate seems to have rested his conclusion upon our recent decision in *Re Stewart*. The opinion in that case cannot be held, in any respect, to justify such a construction. It does decide that contingent interests, although vesting in possession at a future day, may be at once valued and assessed, and that such interests, vesting in no specific beneficiary when the will takes effect, cannot be taxed, but come under the operation of the law when the event which locates and fixes them occurs. It may be that where the only contingency of the future is upon which of several named persons or classes of persons, all of whom are liable to suffer the taxation, the beneficial interests will ultimately devolve, the appraisal and assessment need not be postponed,<sup>213</sup> though even that is hardly a prudent construction, but need not now be discussed; yet where the contingency touches the taxable character of the succession, where it is only in the chance of uncertain events that the beneficial interests will finally alight where they will be taxable at all, a delay until the contingency is solved is both just and necessary. \* \* \*

"A time will come, at the close of the trusts, when the question can be settled; and then, if the property passes to nephews and nieces, the proper assessment can be made and collected."

In *Re Roosevelt*<sup>214</sup> the question of the assessment of contingent estates arose under the act of 1887; and, in following the views expressed in the *Curtis Case*,<sup>215</sup> it was held that, as to the remainders, there was a contingency affect-

<sup>213</sup> See Laws 1892, c. 399, § 11.

<sup>214</sup> 143 N. Y. 120, 38 N. E. 281 (1894), affirming 76 Hun. 257, 27 N. Y. Supp. 741.

<sup>215</sup> 73 Hun. 185, 25 N. Y. Supp. 900.

ing them which rendered it impossible to ascertain their present fair and clear market value.

Bartlett, J., said:

"In the case at bar there is a contingency affecting the value of the estate \* \* \* which brings it strictly within the principle of the Curtis Case. \* \* \*

"The legislature, in the act of 1892, has given a practical construction to its previous legislation on this subject when it provides that, where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment."<sup>216</sup>

The provisions of the act of 1892<sup>217</sup> have already been referred to at length;<sup>218</sup> and their effect would seem to be to postpone both the appraisement and taxation of contingent or future estates, where their value cannot be ascertained at the time of death, to the time when they vest in actual possession or enjoyment. This, as we have seen, is the construction now placed upon these provisions by the court of appeals.<sup>219</sup>

In *Re Hoffman*,<sup>220</sup> where the question was considered under the act of 1892, the will created a life estate upon which another life estate was contingent in the event that the second life tenant survived the first, and, in case she did not so survive, with remainder over to nephews and nieces. Under the act of 1892, there being a tax of 5 per cent. if the

<sup>216</sup> Laws 1892, c. 399, § 3.

<sup>217</sup> Appendix, I. e, c. 399, §§ 3, 11, 22.

<sup>218</sup> Page 245, *supra*.

<sup>219</sup> In *re Roosevelt* (1894) 143 N. Y. 120, 38 N. E. 281, affirming 76 Hun, 257, 27 N. Y. Supp. 741; In *re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311, modifying 76 Hun, 399-403, 27 N. Y. Supp. 1086, and distinguishing In *re Curtis*, 142 N. Y. 219, 36 N. E. 887; In *re Wheeler's Estate* (Surr.) 22 N. Y. Supp. 1075.

<sup>220</sup> 143 N. Y. 330, 38 N. E. 311.

property passed to nephews and nieces, and a tax of 1 per cent. if it passed to lineal heirs, a fact was presented which could not be determined until the remainders vested in possession or enjoyment.

Finch, J., in referring to this difficulty, said:

"For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad.

"The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate' or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained the appraisal is to be adjourned.<sup>221</sup> I can scarcely imagine a contingency, depending upon lives, which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment, unless upon some rare contingency, having no averages; and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt, and yield sums which no sale in the market would produce. My judgment is further guided by the very significant definition of the word 'transfer.'<sup>222</sup> It 'shall be taken to include the passing of property or any interest therein in possession or enjoyment present or future.' It thus contemplates a present enjoyment, or a fixed and absolute right of future enjoyment, and adjourns the appraisal until the fulfillment of contingencies leaves those results attained. Here there must

<sup>221</sup> Laws 1892, c. 399, § 11.

<sup>222</sup> Laws 1892, c. 399, § 22.

be that adjournment until the rights of Ella [contingent life tenant] and Olga [contingent remainder-man] become fixed and actual. The result does no injustice to the state. The trust fund must remain in the hands of the executors to feed the life estates, and for payment over of the remainder. The executors must pay the tax when they know against whom it is chargeable, and the rate to be assessed. The state will get its tax when the legatees get their property.”<sup>223</sup>

So, under the act of 1892, the value of a bequest for life to testator's widow, or until she marries again, cannot be determined, for the purpose of taxation, until the termination of the widow's estate, either by death or marriage.<sup>224</sup>

Where real estate converted by the will of testator into personalty was largely owned by him and others as partners, and used in the prosecution of business, the actual value of which, or testator's interest therein, was dependent on the manner in which it was controlled by the executors, the assessment and collection of the tax to which the same is subject should be postponed until the persons entitled thereto come into the actual possession or enjoyment thereof.<sup>225</sup>

(d) *When Appraisable at Death.*

(4) It was held, under the acts in force prior to 1892, that where the fund or legacy constituting such contingent estate or remainder was certain and fixed in amount, but the person in whom it might eventually vest might never take the estate or remainder, or it could not be determined at decedent's death, whether the estate would vest in a taxable heir or legatee, an appraisement might nevertheless be made at decedent's death, but the payment of the tax was to be

<sup>223</sup> See, also, *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906; reversed as *In re Seaman* (Oct. S. 1895; Ct. App.) 41 N. E. 401.

<sup>224</sup> *In re Millward's Estate* (Surr.) 27 N. Y. Supp. 283.

<sup>225</sup> Laws 1892, c. 399, § 3; *In re Wheeler's Estate* (1892) 1 Misc. Rep. 450, 22 N. Y. Supp. 1075.



postponed until the estate actually vested in possession or enjoyment. In such case the tax could not be imposed upon the principal fund in the possession of the exempt life tenant, as he has a right to use such fund intact and unimpaired.<sup>226</sup> This rule would seem to be sanctioned under the act of 1892,<sup>227</sup> providing that if the property upon the transfer of which a tax is imposed shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time: provided, however, that when such estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable.<sup>228</sup>

Where, therefore, an annuity or legacy be contingent upon the annuitant surviving the life tenant, or of the legatee reaching a certain age, they are appraisable upon decedent's death; but, it being then impossible to determine to whom the property will go, the question as to whether the annuity or legacy is subject to taxation cannot be determined, and should be suspended until the contingency does or does not happen. Upon the death of the tenant it can be deter-

<sup>226</sup> Cases cited *supra*; *In re Clark* (Surr.) 5 N. Y. Supp. 199; *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184. See *In re Peck* (Surr.) 9 N. Y. Supp. 465. But see *In re Johnson*, 6 Dem. Sur. 146; *In re Leavitt* (Surr.) 4 N. Y. Supp. 179; *In re Benjamin*, N. Y. Daily Reg. Dec. 7, 1889.

<sup>227</sup> Laws 1892, c. 399, § 11.

<sup>228</sup> *In re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281. See, also, the remarks of the court in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887.

mined to whom the property will pass, and whether or not it will be subject to the tax.<sup>229</sup>

### § 55. Effect of Appraisement and Appeals Therefrom.<sup>230</sup>

Under the New York statute <sup>231</sup> every appraiser must give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the county treasurer and comptroller,<sup>232</sup> and to such persons as the surrogate may direct. In proceedings for assessment under these statutes, infant legatees or beneficiaries, being entitled to notice, should be represented by special guardian. Where it is sought to dispense with such guardian, proof should be introduced, in the petition for an appraiser, showing facts taking the case outside the general rule.<sup>233</sup> Where infants were not mentioned in the petition for an appraisement, were served with no notice to attend, and were unrepresented by guardian or otherwise in the proceeding, these are jurisdictional defects which must be remedied before any tax can be assessed or fixed.<sup>234</sup> Any person dissatisfied with

<sup>229</sup> In re Clark (Surr.) 5 N. Y. Supp. 199; In re Wallace (Surr.) 4 N. Y. Supp. 465; In re Matthews' Estate, N. Y. Law J. July 27, 1889; In re Stewart, supra; In re Curtis, 142 N. Y. 219, 36 N. E. 887, affirming 73 Hun, 185, 25 N. Y. Supp. 909.

<sup>230</sup> See, also, section 51, supra, and chapter 8, as to "remedy and practice" under these acts.

<sup>231</sup> Laws 1892, c. 399, § 12.

<sup>232</sup> A decree exempting certain corporations made under the act of 1887 was held binding upon the state in another proceeding, and a bar thereto; the court holding that state officials and the county treasurer, comptroller, or district attorney were not required to be notified. In re Wolfe, 137 N. Y. 205, 33 N. E. 156, distinguished in Re Smith (Surr.) 23 N. Y. Supp. 762.

<sup>233</sup> In re Lewis, N. Y. Law J. July 21, 1892, citing In re McPherson, 104 N. Y. 306, 10 N. E. 685.

<sup>234</sup> In re Hamilton, 13 N. Y. Law J. 606.

the appraisement or assessment and determination of tax<sup>235</sup> may appeal therefrom to the surrogate, within 60 days from the fixing, assessing, and determination of the tax by the surrogate, upon filing in the office of the surrogate a written notice of appeal which shall state the grounds upon which the appeal is taken. The same provisions regarding appeals are also contained in the Illinois statute.<sup>236</sup> The hearing before the surrogate must be limited to the errors alleged in the notice of appeal; otherwise the requirement of the statute would be without significance. Where there is manifestly no error alleged, the order will be affirmed.<sup>237</sup>

On an appeal from an order confirming an appraiser's report the appraiser allowed certain sums for burial plot, funeral expenses, and attorney's services. The executrix was sole devisee, and asked to be allowed in addition \$1,917 for erecting a monument over testator's grave, which was disallowed by the appraiser, and this constituted the ground of appeal. The testator left a large amount of unincumbered realty, which was free of tax, and by the allowance of the sum for the monument the personalty of the deceased would be reduced to a valuation of less than \$10,000, and become not taxable. As against creditors, the court held that the allowance of this sum would be excessive, and that, where the contest, as here, was between the sole legatee and the state, the latter should be treated in the same light as a creditor. The appeal was only allowed to the extent of \$1,000.<sup>238</sup>

<sup>235</sup> Laws 1892, c. 399, § 13.

<sup>236</sup> Appendix, X., St. Ill. 1895, (Bradwell's Ed.) p. 215, § 11.

<sup>237</sup> *In re Skidmore*, 13 N. Y. Law J. 704.

<sup>238</sup> *In re Sauter*, 13 N. Y. Law J. 1000.

On this question, rule 26 of the surrogate's court of New York county is as follows: "(1) Upon the filing of the appraiser's report the surrogate will immediately enter the order determining the value of the property and the amount of the tax. The matter will not appear on the calendar at this stage, nor will the court then con-

An order confirming the report of the appraiser and determining the amount of the tax,<sup>239</sup> or an appraisement of property, not appealed from in the manner prescribed by law, becomes final and conclusive as well against the state as against the persons interested,<sup>240</sup> who had due and proper notice of the proceeding resulting in such appraisement,<sup>241</sup> where such appraisement has been made in good faith, and without any mistake, fraud, or concealment on the part of the appraiser, or of the persons interested in the property.<sup>242</sup>

Where property has been withheld from the consideration of the appraiser, whether intentionally or otherwise, and as

sider objections to the report. (2) A party having objections to the report or the order entered thereupon may within 60 days file a notice of appeal. This notice to be served upon all parties appearing before the appraiser, and proof of such service to be filed with the clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the calendar for the next regular motion day. This notice must specify the grounds of objection. (3) A special guardian will be appointed to protect the interest of infants upon the return of the appraiser's notice, if it appears that their rights are involved, and they are not otherwise adequately represented." See *In re Lewis* and cases *supra*.

<sup>239</sup> *In re Miller*, 110 N. Y. 216, 18 N. E. 139; *Id.*, 5 Dem. Sur. 119.

<sup>240</sup> *Com. v. Freedley*, 21 Pa. St. 33; *Stinger v. Com.*, 26 Pa. St. 422; *Strode v. Com.*, 52 Pa. St. 186; *In re Astor*, 6 Dem. Sur. 416; *In re Miller*, *supra*; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Keenan's Estate (Surr.)* 5 N. Y. Supp. 200; *In re Ferrer*, N. Y. Law J. Jan. 30, 1892, p. 1062; *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156. In Pennsylvania, it seems, no appeal can be sustained from the appraiser's assessment unless the record before him shows *prima facie* error. *In re Goldstein's Estate*, 16 Phila. 319.

<sup>241</sup> See, also, *In re Vanderbilt's Estate*, *supra*; *In re McPherson*, 104 N. Y. 303, 10 N. E. 685. As to persons not notified the proceedings are void. *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>242</sup> *In re Astor*, 6 Dem. Sur. 416; *In re Keenan's Estate (Surr.)* 5 N. Y. Supp. 200; *Com. v. Freedley*, 21 Pa. St. 33. And see *Attorney General v. Dardier*, 11 Q. B. Div. 20.

to which the appraiser had no knowledge, and the same was not appraised, the state has the legal right to institute proceedings for the recovery of the tax thereon.<sup>243</sup> And in New York, by recent statute,<sup>244</sup> in certain cases where there has been an appraisement before the surrogate, a further appraisement may be had within two years after entry of the surrogate's decree, before a justice of the supreme court, where the state comptroller shows that the prior decree was the result of fraud, collusion, or is erroneous.

Any personal estate not included in the inventory upon which the tax was assessed is liable to the tax.<sup>245</sup>

But where, pending an appeal from the appraiser's report, the parties liable to the tax, under the decree of the lower court, make payment of it, this does not estop the state from prosecuting the appeal, and recovering interest upon the tax from the date of payment.<sup>246</sup>

And where the liability of an alleged gift to be taxed was in dispute, on which account the decision of the appraiser was suspended, and he subsequently decided that it was liable, the right of appeal only runs from the latter date.<sup>247</sup>

The appraisement, it seems, is conclusive as to the value of the estate, but not as to its liability to taxation.<sup>248</sup>

It seems, the value of policies of insurance at the time of death of testator, where such value has been found by the

<sup>243</sup> *In re Smith* (Surr.; 1893) 23 N. Y. Supp. 762.

<sup>244</sup> Laws 1895, c. 556, amending Laws 1892, c. 399, § 13. See Appendix, I.

<sup>245</sup> *In re Russell's Estate* (1886) 19 Wkly. Notes Cas. 256.

<sup>246</sup> *In re Fagely's Estate*, 128 Pa. St. 603, 18 Atl. 386; Commonwealth's Appeal, 47 Leg. Int. 16.

<sup>247</sup> *Fosselman's Appeal*, 2 Penny. 240. See *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174.

<sup>248</sup> *Stinger v. Com.*, 26 Pa. St. 424; *Strode v. Com.*, 52 Pa. St. 186; *Tyson v. State*, 28 Md. 577.

appraiser from competent evidence, is not the subject of review in the court of appeals.<sup>249</sup>

The failure of the state to commence proceedings for the ascertainment and ultimate collection of the tax due to the fact that there was no administration of decedent's estate, and thus the matter was not brought to the attention of the register, creates no exception to the law, so far as bona fide purchasers are concerned, limiting the right to commence such proceedings to a certain period of time.<sup>250</sup>

In Maryland, where the court is authorized to determine, in its discretion, the amount of the tax against life tenant, annuitant, and remainder-man, its judgment is, by statute,<sup>251</sup> made final and conclusive; but this would seem to refer only to the amount of the tax or the value of the estate, and not to the question of liability.<sup>252</sup>

How often can an appraisement be made, and what is the effect of a subsequent increase in the value of the property appraised, and, incidentally, of fraud, mistake, concealment, or omission?<sup>253</sup> Both the Pennsylvania and the New York statutes allow, under such circumstances, the appointment of an appraiser as often as and whenever occasion may require.<sup>254</sup> In *Com. v. Freedley*,<sup>255</sup> an appraisal had been

<sup>249</sup> *In re Knoedler's Estate* (1893) 140 N. Y. 379, 35 N. E. 601, affirming 68 Hun, 150, 22 N. Y. Supp. 608.

<sup>250</sup> *Appeal of Mellon*, 114 Pa. St. 564, 8 Atl. 183. And see *James' Appeal*, 2 Del. Co. Rep. 164; *In re Cullen's Estate*, 26 Wkly. Notes-Cas. 216; *Id.*, 142 Pa. St. 18, 21 Atl. 781.

<sup>251</sup> Appendix, VIII., § 115.

<sup>252</sup> *Tyson v. State*, *supra*.

<sup>253</sup> See proceedings authorized by the state comptroller in New York. Laws 1895, Appendix I. e, § 13.

<sup>254</sup> *In re Smith's Estate* (Surr.; 1893) 23 N. Y. Supp. 762, distinguishing *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156. See, also, *In re Stewart*, 131 N. Y. 274, 30 N. E. 184.

<sup>255</sup> 21 Pa. St. 33.

made on behalf of the state, and the tax assessed thereon. Subsequently the appraised property increased greatly in value, and the state sought to tax this increase. The opinion of Woodward, C. J., in deciding against the claim, would seem to be of general application. He said:<sup>256</sup> "That the assessment of the appraiser is to be final, if not appealed from, is shown by the act declaring that it is made to fix the valuation of the real estate, that the appraisement of a personal estate is to be fair and conscionable, and that the tax on annuities and life estates is to be immediately payable out of the estate at the rate of such valuation. But property subject to the tax may be fraudulently concealed, incidentally overlooked, or it may not be known to the representatives of the decedent at the time of the appraisement, and therefore the register is to appoint an appraiser 'as often as and whenever occasion may require.'<sup>257</sup> Whenever portions of the estate come to light after the first appraisement, they are to be appraised in the same manner, but as to such portions as were the subject of the appraisement the 'clear value' is fixed, and the law assesses the tax. \* \* \* Such is the system provided for collateral inheritance taxation, and it does not admit of opening to take in additions to the clear value of property once assessed. That property is vested in the heir or devisee. If it appreciates after it comes to him, it is his good luck; if it depreciates, it is his misfortune. But as the state would not submit to a readjustment for the purpose of diminishing her taxes, in the event of subsequent depreciation, she is not entitled to a readjustment for the purpose of increasing it, by reason of an advance in the market value of the estate after an assessment by officers of her own appointment, with the right of appeal.<sup>258</sup> The commonwealth is as much subject to the

<sup>256</sup> 21 Pa. St. 36.

<sup>257</sup> See *In re Smith*, *supra*.

<sup>258</sup> See *In re Bird's Estate*, N. Y. Law J. July 28, 1890.

rules of equity and justice as her citizens. She possesses the taxing power, but, when it has been fairly employed according to her own dictation, it is spent and gone.”<sup>259</sup>

Seemingly in direct antagonism to *Com. v. Freedley* is a case under the English legacy act, but it turned, in reality, upon the construction of language not contained in the American statute.<sup>260</sup>

In *Attorney General v. Dardier*, to which we refer,<sup>261</sup> certain valuable pictures were devised as a specific legacy. A duty had been accepted by the crown upon a low valuation, apparently made in good faith, between the taxing commissioners and the executors. Subsequently the executors sold the pictures at a large advance, and it was held<sup>262</sup> that notwithstanding these facts the crown was entitled to further duty upon the increase, although there was no fraud upon the part of the executors. Pollock, B., treated the first appraisement as having been made under a common mistake upon the part of both parties,—that the pictures were not to be sold,—which, being discovered, entitled the crown to duty upon the actual value of the proceeds of the property, when sold.

So, where property was omitted by mutual mistake from the appraisement, a further appraisement was allowed 13 years afterwards, but the executors were relieved from penalty.<sup>263</sup>

<sup>259</sup> See, also, *Coleman v. Com.*, 52 Pa. St. 468; *Stinger v. Com.*, 26 Pa. St. 425; *In re Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 435, 17 Atl. 1096. See *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Bird's Estate*, supra.

<sup>260</sup> *Attorney General v. Dardier*, 11 Q. B. Div. 16. But see *Attorney General v. Sefton*, 11 H. L. Cas. 257.

<sup>261</sup> 11 Q. B. Div. 16.

<sup>262</sup> Under 53 Geo. III. c. 52, § 22.

<sup>263</sup> *In re Brewer's Estate*, 16 Pa. Law. J. (N. S.) 114, 15 Pa. Law J. (N. S.) 435; *In re Fagely's Estate* (Appeal of Commonwealth) 128 Pa. St. 613, 18 Atl. 386. See *In re Keenan's Estate* (Surr.) 5 N. Y.



It seems, a certified receipt of the county treasurer or comptroller of the county where jurisdiction was first acquired will be full protection to any subsequent purchaser of such land, as against any claim for the tax.<sup>264</sup>

The great age of a life tenant whose share is subject to taxation affords no reason for postponing the confirmation of the appraiser's report.<sup>265</sup>

In New York the surrogate is not bound by the appraiser's report, but may take such further evidence as he deems proper, and base his decision thereon.<sup>266</sup>

Such report is not final. It is to aid the surrogate to decide what property is liable to the tax, and it is subject to confirmation, revision, or rejection by the surrogate.<sup>267</sup> And, where all papers are not submitted to the appraiser before he makes his report, the proceeding will be remitted to him to proceed de novo.<sup>268</sup>

Supp. 200; *In re Astor*, 6 Dem. Sur. 416; *Fosselman's Appeal*, 2 Penny. 240.

<sup>264</sup> *In re Keenan's Estate*, supra.

<sup>265</sup> *In re Wilkes' Estate*, N. Y. Law J. Oct. 31, 1889.

<sup>266</sup> *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *In re McGowan's Estate*, N. Y. Law J. July 30, 1890. But see *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>267</sup> *In re McGowan's Estate*, supra.

<sup>268</sup> *In re Jones' Estate*, N. Y. Law J. July 31, 1890; *In re Knoedler*, N. Y. Law J. June 3, 1892; *In re Dreyer*, N. Y. Law J. Feb. 17, 1892.

## CHAPTER VI.

### VESTED AND CONTINGENT ESTATES—TRANSFERS INTER VIVOS AND CAUSA MORTIS—POWERS AND LEGACIES.

- § 56. Life Estates, Annuities, Legacies, and Joint Tenancies.
57. Relative Rights of Life Tenant and Remainder-Man.
58. Remainders, Contingent and Future Estates.
- (a) Under the English Statutes.
  - (b) Under the Acts of Congress.
  - (c) Under New York Statutes of 1885, 1887, 1892.
    - (1) Preliminary Review of Early Statutes.
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      - (a) Vested Estates.
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      - (e) Appraisable and Taxable when Vesting in Possession or Enjoyment.
      - (f) Estates Taxable under Retroactive Clause, New York Act of 1892.
  - (d) Under Pennsylvania Statutes.
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59. Fraudulent Transfers, Trusts, and Gifts Inter Vivos and Causa Mortis.
60. Powers of Appointment.
61. Legacies for Debts and Other Obligations.

### § 56. Life Estates, Annuities, Legacies, and Joint Tenancies.

We have already considered the general nature and constitutionality of collateral inheritance, legacy, and succession tax laws,<sup>1</sup> and of the exemptions from taxation under such laws,<sup>2</sup> including questions relating to the domiciliary

<sup>1</sup> Chapters 1, 2.

<sup>2</sup> Chapter 3.

condition either of person or property with respect to this tax.<sup>3</sup> So the various provisions of law relating to the appraisal or valuation of property under these statutes have been considered in the preceding chapter.

In the present chapter, in addition to the consideration of the liability of both vested and contingent estates or remainders, it has also been deemed proper to include several other important topics, such as fraudulent or intentional transfers, trusts and gifts *inter vivos* to evade the tax,<sup>4</sup> powers of appointment,<sup>5</sup> and legacies in payment of debts and other obligations.<sup>6</sup>

Cases embracing a right or power of disposition in the life tenant, where the remainder-man is not exempt, and involving relative rights of life tenant and remainder-man, have likewise been considered in the present chapter.<sup>7</sup>

The general rule is that the tax due by tenant for life is payable immediately when distribution is or should be made, and, if payment is delayed, the consequence must fall on him, and not upon the remainder-man.<sup>8</sup>

So where there is a bequest of a fund in trust for one during life, with remainder to others, the tax is payable forthwith on the life estate out of accruing income, and on the principle when the life estate has fallen.<sup>9</sup> This is so both with annuities and life estates.<sup>10</sup> The tax should be upon the clear value of the life estate at the testator's death, and

<sup>3</sup> Chapter 4.

<sup>4</sup> Post, § 59.

<sup>5</sup> Id. § 60.

<sup>6</sup> Id. § 61.

<sup>7</sup> See section 57, post; *In re Cager*, 111 N. Y. 343, 18 N. E. 866; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900.

<sup>8</sup> *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106.

<sup>9</sup> *In re Christian's Estate*, 2 Parker, Cr. R. 91; *In re Johnson*, 6 Dem. Sur. 146; *In re Willing's Estate*, 2 Wkly. Notes Cas. 307, 308; *In re Wharton's Estate*, supra; *In re Thomson's Estate*, 12 Phila. 131; *In re Forbes' Estate*, 16 Phila. 356; *Commonwealth's Appeal*, 127 Pa. St. 438, 17 Atl. 1094.

<sup>10</sup> *In re Budd's Estate* (1892) 49 Leg. Int. 502, 12 Pa. Co. Ct. R. 476, and 2 Pa. Dist. R. 148.

not upon the value of the property when it is assessed.<sup>11</sup> An annuity is an estate within the meaning of these statutes.<sup>12</sup> And legacies payable out of income are annuities.<sup>13</sup> Annuities granted to trustees to be employed by them while carrying on testator's business are taxable as legacies under the English legacy act.<sup>14</sup> The word "legacy" will sometimes be held to include real estate.<sup>15</sup> The liability of such annuities to the tax is not affected by the fact that the income applied to their payment must be paid out of and is likely to diminish the principal fund.<sup>16</sup>

On the other hand, it has been held that, where the life tenant is an exempt person, there is no principle upon which the fund in his hands—and which he has the right to enjoy intact—can be appropriated for the purpose of paying a tax upon contingent annuities before the death of the life tenant,<sup>17</sup> unless expressly directed by will;<sup>18</sup> as where the gift was of a net annual sum of \$1,200, and its payment was directed to be made quarterly in sums of \$300, with reservation of a principal sum out of the investments of the dece-

<sup>11</sup> *U. S. v. New York Life Ins. & Trust Co.*, 9 Ben. 413, Fed. Cas. No. 15,873; *In re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394. *Supra*, c. 4, § 49.

<sup>12</sup> *In re Bispham's Estate*, 46 Leg. Int. 98; *In re Thomson's Estate*, 5 Wkly. Notes Cas. 19.

<sup>13</sup> *In re Williamson's Estate*, 143 Pa. St. 150, 22 Atl. 836.

<sup>14</sup> *Thorley v. Massam* [1891] 2 Ch. Div. 613.

<sup>15</sup> *In re Miller*, 7 N. Y. Law J. 308.

<sup>16</sup> *In re Leavitt's Estate*, *supra*; *In re Johnson*, 6 Dem. Sur. 146; *In re Van Beuren*, N. Y. Law J. March 26, 1891, p. 1600.

<sup>17</sup> *In re Clark* (Surr.) 5 N. Y. Supp. 199; *In re Hopkins*, 6 Dem. Sur. 1. See *In re Peck* (Surr.) 9 N. Y. Supp. 465, 24 Abb. N. C. 365, note. See, also, *In re Christian's Estate*, 2 Pa. Co. Ct. R. 91, and cases cited *supra*.

<sup>18</sup> See cases post, § 61. But see *In re Spies*, N. Y. Law J. July 21, 1892, citing *In re Swift's Estate* (Surr.) 16 N. Y. Supp. 193; *Id.* (Sup.) 19 N. Y. Supp. 292; *Id.*, reversed on another point, 137 N. Y. 77, 32 N. E. 1016.

dent's estate ample to yield a net income of \$1,200 per annum, the tax falls upon the residue and not upon the annuitant.<sup>19</sup> In Massachusetts the tax on annuities is to be paid out of the annuity as soon as the annuity becomes payable, and at the time when payments on account of the annuity are made, though the effect may be that the first payments will be exhausted by the tax.<sup>20</sup> So where decedent bequeathed one-fourth of his estate, to invest the same and to pay to M. the sum of \$300 per annum till the fund be exhausted, if she so long live, this was held not to be an annuity, but a legacy payable in annual installments, and, the remainder being to lineal heirs, the tax was only due on each payment as made, and not upon the entire fund.<sup>21</sup> In one case it was held that the decree should provide for the retention of a sum the income of which at the rate of 4 per cent. per annum would be sufficient to defray the amount of the tax.<sup>22</sup> Again it has been held <sup>23</sup> that after the property has been assessed, and the tax fixed, it is no concern of the court as to whether, under the will, the tax shall be paid by the annuitants or shall fall upon the residuary estate. It is no concern of the state that the testator may have directed a particular fund out of which the tax shall be paid. The testator cannot compel the state to look for the tax to others than the legatee or fund taxable under the act.<sup>24</sup>

In England, where the duty is chargeable by will upon the residuary estate, and the legacies are relieved therefrom, and the residuary estate proves insufficient to pay the same,

<sup>19</sup> *Bispham's Estate*, 46 Leg. Int. 98; *In re Van Beuren*, 4 N. Y. Law J. (March 26, 1891) p. 1600.

<sup>20</sup> *Minot v. Winthrop* (1894) 162 Mass. 116, 38 N. E. 512.

<sup>21</sup> *In re Crompton's Estate* (1891) 48 Leg. Int. 452, 10 Pa. Co. Ct. R. 443, and 29 Wkly. Notes Cas. 36.

<sup>22</sup> *In re Van Beuren*, *supra*.

<sup>23</sup> *In re Spies* and cases cited, *supra*.

<sup>24</sup> *In re Swift*, 137 N. Y. 77, 32 N. E. 1096.

the legatees must pay duty to the extent to which the general estate is insufficient to pay the same.<sup>25</sup>

Under the New York statute it has been held that, where it is impossible to ascertain the person to whom such annuities will be payable until the death of the life tenant, they are not taxable until such death.<sup>26</sup>

In *Re Roosevelt's Estate*,<sup>27</sup> decedent, who died in 1887, gave his residuary estate to his executors, in trust to pay the income thereof to his wife during her life. Upon her death said estate was given to beneficiaries named, subject to the payment of certain annuities specified, each given for the life of the annuitant; and it was held that neither the annuities nor the remainders were presently taxable under the act of 1887; that as to the annuitants they had no vested interest, and could take none until the death of the wife, and as to the remainders there was a contingency affecting them which rendered it impossible to ascertain their present fair and clear market value. Bartlett, J., said: "It does not follow because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest. Until that time the power to tax does not exist. The testator has created seven life annuities if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive, a portion may be living, every one may be dead. To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice." The value of a bequest to testator's widow for life,

<sup>25</sup> *Wilson v. O'Leary*, L. R. 17 Eq. 419.

<sup>26</sup> *In re Clark's Estate* (Surr.) 5 N. Y. Supp. 199. See *In re Curtis*, 142 N. Y. 219, 36 N. E. 887, affirming 73 Hun, 185, 25 N. Y. Supp. 909; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311; and cases post, § 58, subds. c, 3c.

<sup>27</sup> *Supra*.

or until she marries again, cannot be determined, for the purpose of taxation, until the termination of the widow's estate, either by death or marriage.<sup>28</sup>

So it has been held that the interest of a wife in real estate devised to herself and husband as tenants by the entirety is taxable during the husband's lifetime, as her interest is vested and certain, and she may, by statute,<sup>29</sup> compel partition of the property.<sup>30</sup> The statute has been construed at law, however, as only allowing the wife to claim partition where the husband agrees thereto.<sup>31</sup> But the estate of the wife, as tenant by the entirety, being in the nature of a vested remainder, which she could not be deprived of by any act of her husband, would seem to be a taxable interest under the statute, notwithstanding her husband should refuse to join in partition proceedings.

In England the liability of joint tenants for this tax is specially regulated by statute.<sup>32</sup> Where an annuity is given by a testator's will to a daughter for life, with a provision that if the daughter die before her youngest child shall have arrived at legal age said annuity is to be paid to the daughter's husband, "or the guardian that may be of said children," said legacy, being evidently given to the husband for the use of his children, is not liable to collateral tax.<sup>33</sup>

<sup>28</sup> *In re Millward's Estate* (Surr.) 27 N. Y. Supp. 286.

<sup>29</sup> Laws N. Y. 1880, c. 472.

<sup>30</sup> *In re Higgins' Estate*, 36 N. Y. Daily Reg. 906; distinguishing *In re Le Fever*, 6 Dem. Sur. 154, and *In re Hopkins*, 6 Dem. Sur. 1, and citing *In re Willing's Estate*, *supra*.

<sup>31</sup> *O'Connor v. McMahon*, 54 Hun, 66, 7 N. Y. Supp. 225. See, also, *Stelz v. Schreck* (Sup.) 10 N. Y. Supp. 790; *Beach v. Hollister*, 3 Hun, 519; *Newell v. Newell*, 7 Ch. App. 253.

<sup>32</sup> 36 Geo. III. c. 52, § 15; 16 & 17 Vict. c. 51, § 3. See chapter I, § 4, note 42.

<sup>33</sup> *In re Morris' Estate* (1892) 49 Leg. Int. 424, 1 Pa. Dist. Rep. 818.

### § 57. Relative Rights of Life Tenant and Remainder-Man.

The estate of tenant for life and that of remainder-man are to be considered distinct and separate, and neither is to be affected by the tax, interest, or penalty to be paid by the other.<sup>34</sup> Hence tenant for life is entitled to the enjoyment of the entire estate while he lives, he paying only the tax assessed upon the value of such estate; while tenant in remainder, when he shall come into the possession and enjoyment, is entitled to it without other deduction than the tax paid by himself, and such interest as may have accrued thereon. The tax upon the tenant for life being chargeable, as we have seen, out of the income belonging to him, and that of the remainder-man out of the valuation of his remainder.<sup>35</sup> Hence, on a bequest of a fund in trust for one during life, with remainder to others, the tax is payable on the life estate forthwith out of accruing income, and on the principal when the life estate has fallen.<sup>36</sup> Where legacies are made a charge upon realty which is devised in trust for life to another, the tax upon the legacies is not postponed to the termination of the trust estate, but they are payable at decedent's death.<sup>37</sup>

Where the interest of the life beneficiary is not taxable,

<sup>34</sup> Commonwealth's Appeal (Cooper's Estate) 127 Pa. St. 438, 17 Atl. 1095.

<sup>35</sup> In re Wharton's Estate, 10 Wkly. Notes Cas. 105, 14 Phila. 279; In re Forbes' Estate, 16 Phila. 356; Commonwealth's Appeal (Cooper's Estate), supra; In re Thomson's Estate, 12 Phila. 131; In re Christian's Estate, 2 Pa. Co. Ct. R. 91; In re Johnson, 6 Dem. Sur. 146; In re Leavitt's Estate (Surr.) 4 N. Y. Supp. 179; In re Clark (Surr.) 5 N. Y. Supp. 199.

<sup>36</sup> In re Christian's Estate, supra; In re Johnson, supra.

<sup>37</sup> In re Wright, 6 N. Y. Law J. p. 317.



and that of the remainder-man is, it has been held in New York that the amount of the remainder-man's tax is lawfully payable out of the principal notwithstanding the tax on the remainder will reduce the capital, and so affect the income of the life tenant.<sup>38</sup> But the authorities upon this point in that state are not harmonious.<sup>39</sup> And, in view of the adjudications in Pennsylvania, the rule by which the exempt life tenant's interest is impaired for the purpose of imposing a tax upon the remainder-man would seem to be of doubtful propriety. It has been questioned and dissented from.<sup>40</sup> Under the Pennsylvania statute it is held that even where both tenant for life and the remainder-man are taxable, the only tax demandable upon decedent's death is that upon the outstanding life estate, to be paid by the life tenant alone or charged against her income; and it is optional whether tenant in remainder pays the tax in anticipation of his estate accruing or at the time it actually comes into possession.<sup>41</sup> Whether tenant in remainder will avail himself of the privilege of anticipating payment is a matter which he alone, or his trustees for him, should determine.<sup>42</sup> Where the life estate is not ended, the tax on remainder is not demandable, and no assessment should be made.<sup>43</sup> Where tenant for life is exempt, the whole tax is payable by tenant

<sup>38</sup> *In re Johnson*, *supra*; *In re Leavitt's Estate*, *supra*. See *In re Peck* (Surr.) 9 N. Y. Supp. 465, and note to 24 Abb. N. C. 365.

<sup>39</sup> See *contra*, *In re Hopkins*, 6 Dem. Sur. 1; *In re Clark*, *supra*; *In re Peck's Estate*, *supra*.

<sup>40</sup> *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>41</sup> *In re Wharton's Estate*, *supra*; *In re Willing's Estate*, 2 Wkly. Notes Cas. 307, 308.

<sup>42</sup> *Id.*

<sup>43</sup> *In re Butler's Estate* (1894) 14 Pa. Co. Ct. R. 667. But by act of 1887 (Appendix, III: § 2) the appraisement seems also to be now postponed. See chapter 5, § 54, subd. c. See *In re Budd's Estate* (1892) 49 Leg. Int. 502, where it is held that life estates and annuities subject to the tax are to be appraised and the tax paid at once.

in remainder, and in such case the time of payment merely is postponed until the estate comes into actual possession.<sup>44</sup> If he elect to pay at the death of the decedent, the tax is assessable at the time of payment on the then valuation of the entire estate, less the value of the life estate or term of years;<sup>45</sup> the cases in connection with which subject have been considered in the chapter on "Appraisement."<sup>46</sup> Tax upon a legacy subject to a life estate is not payable until the termination of the life estate, provided that security for its payment at that time be duly entered; the right to pay the tax by way of anticipation at a valuation then to be made being also given.<sup>47</sup> Where the will vests in the devisee an estate in fee, it cannot be taken away by a subsequent clause limiting the estate to a life estate, under the rule that the lesser estate must give way to the general intent giving a greater estate in clear terms; hence the devisee is liable to pay a tax upon an estate in fee.<sup>48</sup>

The statute of Massachusetts<sup>49</sup> provides that the present worth of a remainder must be ascertained by deducting the value of the life estate from the appraised value of the property, and that the value of the life estate is to be determined by actuaries' tables. Under these provisions, where a wife left to her husband a life estate in \$10,000, not taxable, at his decease to go to E., the tax upon the remainder must be computed and deducted from the principal sum; and, although the tenant for life will have lost the income on the

<sup>44</sup> *In re Wharton's Estate*, 10 Wkly. Notes Cas. 105; *In re Willing's Estate*, 2 Wkly. Notes Cas. 307, 308.

<sup>45</sup> *Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 435, 17 Atl. 1095; affirming *Cooper v. Com.*, 5 Pa. Co. Ct. R. 275; *Appeal of Mellon*, 114 Pa. St. 572, 8 Atl. 183.

<sup>46</sup> Chapter 5, § 54, subd. c.

<sup>47</sup> *In re Budd's Estate* (1892) 49 Leg. Int. 502, 12 Pa. Co. Ct. R. 476, and 2 Pa. Dist. Rep. 148.

<sup>48</sup> *Sprankle v. Com.*, 2 Walk. (Pa.) 420.

<sup>49</sup> See Appendix, IV., Laws 1891, c. 425, §§ 2, 13.

amount so deducted, such a loss must be borne by legatee in remainder.<sup>50</sup>

## § 58. Remainders, Contingent and Future Estates.

### (a) *Under the English Statutes.*

Under the perfect system of the English law, all interests, vested and contingent, and whether passing by will, intestate law, or by deed inter vivos, gift causa mortis, or otherwise, are at some time made subject to taxation under these statutes. Layton says:<sup>51</sup> "To whatever medium a person may resort—will, deed, bond, etc.—for the disposition of his real and personal estate on his death, such property is now chargeable with duty; nor does the nature of the instrument in the least affect the payment of the tax. The provisions are of a most comprehensive and searching character, so much so that it is difficult to imagine a transaction or dealing with property to take effect upon a death after the 19th of May, 1853, that will elude its operation, general or special."<sup>52</sup>

The duties are to be paid on the successor, or any person in his right or on his behalf, becoming entitled in possession,<sup>53</sup> unless the title to the succession is accelerated by the extinction or surrender of any prior interest, in which case the duty is to be paid at the same time and in the same manner as if no acceleration had taken place.<sup>54</sup>

<sup>50</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512. Contra, *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106.

<sup>51</sup> *Legacy and Succession Taxes* (9th Ed.), London, 1892, 110, 111, 122, et seq.

<sup>52</sup> See, as to contingent interests, 36 Geo. III. c. 52, § 17; 16 & 17 Vict. c. 51, §§ 2, 20, 35. See, also, cases cited post, § 58, subd. 3f. as to retroactive statutes.

<sup>53</sup> 16 & 17 Vict. § 20.

<sup>54</sup> 16 & 17 Vict. § 15; *Trev. Tax. Suc.* (4th Ed.) 189. See *Lord Adv. v. McDonald*, 24 Sc. Sess. Cas. (2d Ser.) § 1175; *Attorney*

So, in estimating the value of a succession, no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but, in the event of the same so passing, the successor shall be entitled to a return of so much of the duty paid by him as will reduce the sum to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interests.<sup>56</sup>

(b) *Under Acts of Congress.*

Under the acts of congress<sup>56</sup> in force until the year 1870, the tax was only due and payable upon such interests in remainder when the beneficiary became entitled to the possession and enjoyment of the estate, or to the beneficial interest in the profits arising therefrom; hence it was held that estates in remainder were not taxable until the successor became entitled to the possession or enjoyment or the expectancy terminated, and legacies which did not vest in possession or enjoyment until after the act was repealed were not liable.<sup>57</sup>

Under these acts<sup>58</sup> a succession was defined to denote the devolution of the title of any real estate, hence it was conferred where the following conditions occurred: A past disposition of real estate by will, deed, or the laws of descent, by reason of which the person taxed became benefi-

General v. Middleton, 3 Hurl. & N. 125; Wilcox v. Smith, 4 Drew. 40; 26 Law J. Ch. 596. The executor is allowed to commute duties upon contingent interests under 43 Vict. c. 14, §§ 10, 11.

<sup>56</sup> 16 & 17 Vict. c. 51, § 36; 36 Geo. III. c. 52, § 17.

<sup>57</sup> 13 Stat. 287, §§ 125, 126; 16 Stat. 256, § 127. See Rev. St. U. S. (2d Ed.; 1878) §§ 3438, 3439; chapter 1, § 5, notes 44, 45.

<sup>58</sup> Wright v. Blakeslee, 101 U. S. 174; Clapp v. Mason, 94 U. S. 589; Mason v. Sargent, 104 U. S. 689; U. S. v. Hazard, 8 Fed. 380; U. S. v. Bruce, Id. 381. And see chapter 5, § 54, subd. a.

<sup>59</sup> Act June 30, 1864, c. 126; 13 Stat. 287, §§ 125, 126; 16 Stat. 256, § 127.

cially entitled, in possession or expectancy, to the real estate or income thereof, and by which the person so taking became so entitled upon the death of the person making such disposition, and that the grantor died after the passage of the imposing act.<sup>59</sup>

Hence, where an estate for the life of another was given to trustees with a remainder in fee to the children of such life tenant surviving her, a succession was created under these acts, and the tax was due and payable at her death.<sup>60</sup>

A succession tax was, however, imposed where the life tenant accelerated the succession by an amicable agreement dividing the estate between herself and the remainderman.<sup>61</sup>

(c) *Under New York Statutes of 1885, 1887, 1892.*

(1) *Preliminary Review of Early Statutes.*

The original New York statute, passed in 1885,<sup>62</sup> as amended in 1887, subjected to the tax all property, in trust or otherwise, by the devolution of which any person or body politic should become beneficially entitled, in possession or expectancy, upon the testator's or grantor's death, and where any devolution<sup>63</sup> should be an estate, income, or interest, for a term of years or for life, or determinable

<sup>59</sup> *Blake v. McCartney*, 4 Cliff. 101, Fed. Cas. No. 1,498; *Wright v. Blakeslee*, supra.

<sup>60</sup> *Wright v. Blakeslee*, supra.

<sup>61</sup> *Brune v. Smith*, 13 Int. Rev. Rec. 54, Fed. Cas. No. 2,053; *Ex parte Stitwell*, 59 Law T. R. 539. But see *Page v. Rives*, 1 Hughes, 297, Fed. Cas. No. 10,666.

<sup>62</sup> Laws 1885, c. 483. See Appendix, I., Laws 1887, c. 713; Laws 1892, c. 399. See note on "Contingent Remainders," by Austin Abbott, Esq., 19 Abb. N. C. 234; 24 Abb. N. C. 365; note on "Vested Estates," 18 Abb. N. C. 300; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401; *In re Curtis*, 142 N. Y. 219, 36 N. E. 887.

<sup>63</sup> Laws 1887, § 2.

upon any future or contingent event, or should be a remainder, reversion, or other expectancy, real or personal, it was to be appraised immediately after the decedent's death, at its fair and clear market value at the time of death, and its value determined by the surrogate,<sup>64</sup> and the tax thereon was immediately due and payable. It was also provided that the persons beneficially interested in the property chargeable with said tax might elect not to pay the same until they should come into the actual possession or enjoyment of such property, in which case they were to file a bond, to be given to the people of the state, in a penalty of three times the amount of the tax, arising upon personal estate, conditioned for the payment of the tax and interest at such time or period as they or their representatives should come into the actual possession and enjoyment of such property.

These acts, and especially that of 1885, were early criticised as being imperfect and impracticable of enforcement in many instances, and especially with respect to the taxation of contingent remainders or future estates,<sup>65</sup> while its provisions, as borrowed from the early statutes of Pennsylvania, have been characterized as harsh and oppressive. These strictures have, to a limited extent, proved to be just, but the practical workings of the statutes, generally, have shown better results in the state of New York for this system of taxation than were at first anticipated or hoped for; and, as the court of appeals said, its provisions have been found comprehensive enough to embrace all estates in possession or expectancy, gifts of the corpus or of the income, and estates in trust; and the obvious intent of the legislature, it is said, was to impose a tax

<sup>64</sup> Prior to 1887 the Northampton Tables were followed. See *In re Robertson*, 5 Dem. Sur. 92.

<sup>65</sup> See *In re McPherson*, 104 N. Y. 324, 10 N. E. 685; *In re Cager*, 111 N. Y. 350, 18 N. E. 866.

on every interest, immediate or future, derived under a testator or intestate.<sup>66</sup>

This was true, but by this language the court did not mean that all future or contingent estates or interests whatever, where the vesting or taxability was uncertain, were to be taxed at decedent's death, but such seems to have been the impression.<sup>67</sup>

And, in pursuance of this declaration, attempts were made under these early acts to assess and tax, as of the time of death, not only vested estates, interests, or remainders, but also to assess and tax, as of the same time, contingent or future interests devised to collateral heirs, in which there was only the barest possible chance or opportunity of the estate ever vesting in the beneficiaries,

<sup>66</sup> In *re Stewart* (1892) 131 N. Y. 281, 30 N. E. 184. See, also, In *re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311. The language of the act of 1892 (chapter 399) is also very broad. See section 22, Appendix; In *re Cunningham*, 7 N. Y. Law J. 954.

<sup>67</sup> See In *re Curtis*, 142 N. Y. 223, 36 N. E. 887, where the court, in distinguishing the *Stewart Case*, said: "The opinion in that [*Stewart*] case cannot be held in any respect to justify such a construction. It does decide that contingent interests, although vesting in possession at a future day, may be at once valued and assessed, and that such interests vesting in no specific beneficiary when the will takes effect cannot then be taxed, but come under the operation of the law, when the event which locates and fixes them occurs. It may possibly be that, where the only contingency of the future is upon which of several named persons or classes of persons, all of whom are liable to suffer the taxation, the beneficial interests will ultimately devolve, the appraisement and assessment need not be postponed, though even that is hardly a prudent construction, but need not now be discussed; yet when the contingency touches the taxable character of the succession, where it is only in the chance of uncertain events that the beneficial interests will finally alight where they will be taxable at all, a delay until the contingency is solved is both just and necessary." See, also, *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as In *re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

and where it was impossible to determine, at decedent's death, in whom such estates would vest, whether in taxable or nontaxable persons, heirs or legatees.<sup>68</sup> Speaking particularly of estates of this nature, before these acts with reference to this question were very well understood in New York, we said, in our first edition,<sup>69</sup> that it would seem to be just that both the assessment and payment of the tax upon such estate should only take place when such estates vested in possession, giving the remainderman the right, however, if he so elected, of anticipating payment. This practice of attempting to tax such estates, as of the time of death, under the early acts, was finally promptly condemned in most positive language by the judges, when the question was definitely presented to the court of appeals, in *Re Curtis*,<sup>70</sup> and a delay until the contingency was solved was said to be both just and necessary, when the proper assessment could be made and collected. Finch, J., said, substantially, that the attempt to tax such estates was "too unjust to be borne." This ruling was followed in later cases by the same court<sup>71</sup> in construing these acts; and also under the act of 1892,<sup>72</sup> Bartlett, J., declaring<sup>73</sup> that it "shocks the sense of justice."

<sup>68</sup> See the following cases of this character in the lower courts: *In re Cunningham*, supra; *In re Curtis*, 6 N. Y. Law J. 1514, citing *In re Stewart*, supra; *In re Ferrer*, 6 N. Y. Law J. 1062; *In re Stanford*, 9 N. Y. Law J. 327; *In re Hoffman's Estate*, 5 Misc. Rep. 439, 26 N. Y. Supp. 888, reversed in 76 Hun, 399, 27 N. Y. Supp. 1086, and 143 N. Y. 333, 38 N. E. 311.

<sup>69</sup> September, 1890, p. 160.

<sup>70</sup> 142 N. Y. 223, 36 N. E. 887; affirming 73 Hun, 185, 25 N. Y. Supp. 909.

<sup>71</sup> *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281; *In re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311.

<sup>72</sup> Laws 1892, c. 399.

<sup>73</sup> *In re Roosevelt's Estate*, supra.



(2) *Provisions of Transfer Tax of 1892.*

Under this statute, entitled "An act in relation to taxable transfers of property," as construed by the court of appeals,<sup>74</sup> it would now seem that both the assessment and taxation of contingent or future estates and interests cannot be made at decedent's death, but is now adjourned until such estates or interests vest in the actual possession or enjoyment of the beneficiary.

This is substantially the effect of the provisions of the act of 1892.<sup>75</sup>

That statute provides that "if the property upon the transfer of which a tax is imposed shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion, or other expectancy, real or personal,"<sup>76</sup> the entire property or fund by which such estate,

<sup>74</sup> In re Roosevelt's Estate, *supra*; In re Hoffman's Estate, *supra*; Talmadge v. Seaman, *supra*.

<sup>75</sup> See Appendix, I. e, for this statute, with amendments to 1895.

<sup>76</sup> The following are some of the provisions of the New York Revised Statutes (Banks' 8th Ed., vol. 4, § 2431), defining vested and contingent estates:

"Sec. 7. Estates as respects the time of their enjoyment are divided into estates in possession and estates in expectancy.

"Sec. 8. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to possession is postponed to a future period.

"Sec. 9. Estates of expectancy are divided into (1) estates commencing at a future day denominated future estates, and (2) reversions.

"Sec. 10. A future estate is an estate limited to commence in possession on a future day either without the intervention of a precedent estate or on the determination by lapse of time or otherwise of a precedent estate created at the same time.

"Sec. 11. Where a future estate is dependent upon a precedent

income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof, at that time; provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future or contingent or limited estate, income, interest, or annuity dependent upon any life or lives in being, shall be determined by the rule, method, and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for computing the present value of all future and contingent interests or estates shall be 5 per centum per annum.”<sup>77</sup> The superintendent of insurance shall, on the application of any surrogate, determine the value of

estate it may be termed a remainder and may be created and transferred by that name.

“Sec. 12. A reversion is the residue of an estate left in the remainder-man or heirs or in the heir of the testator commencing in possession on the determination of a particular estate granted or devised.

“Sec. 13. Future estates are either vested or contingent. They are vested when there is a person who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain.”

“Sec. 35. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession.”

Upon these sections see *Griffen v. Shephard*, 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun, 355; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401; *In re Tobias*, 12 N. Y. Law J. 1164.

<sup>77</sup> Appendix, I. e., Laws 1892, c. 399, § 11.

any such future or contingent estates, income, or interest limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate; and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.<sup>78</sup>

The statute further provides<sup>79</sup> that all taxes imposed by the act shall be due and payable at the time of the transfer,—i. e. the death of the decedent:<sup>80</sup> provided, however, that taxes upon the transfer of any estate, property, or interest therein, limited, conditioned, dependent, or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

Any person or corporation beneficially interested in any property chargeable with a tax, \* \* \* and executors, administrators, and trustees thereof, may elect within one year from the date of the transfer thereof, as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof.<sup>81</sup>

The statute provides<sup>82</sup> that the words "estate" and "property," as used in the act, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of the

<sup>78</sup> Laws 1892, c. 399, § 13.

<sup>79</sup> Laws 1892, c. 399, § 3.

<sup>80</sup> See *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>81</sup> Laws 1892, c. 399, § 7. See Appendix, I. e.

<sup>82</sup> Laws 1892, c. 399, § 22.

act, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantor, donees, or vendees;<sup>83</sup> and shall include all property or interest therein, whether situated within or without the state, over which the state has any jurisdiction for the purposes of taxation.<sup>84</sup> The word "transfer," as used in the act, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale, or gift in the manner prescribed.<sup>85</sup>

(3) *Decisions under These Acts.*

The liability to taxation of remainder-men and of future or contingent estates under the acts of 1885, 1887, 1892, may be summarized in the following order, and, while the law on this subject is much better settled, it must be conceded that many of the questions discussed with reference to such estates have not yet been definitely determined by the highest courts in New York.

(a) *Vested Estates.*

So far as vested remainders or estates are concerned, the tax upon them is held to be due and payable immediately upon decedent's death.<sup>86</sup> All other things being

<sup>83</sup> This section materially changes the law as it originally stood under the acts of 1885 and 1887. See *In re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311.

<sup>84</sup> See, as to jurisdiction over the estate of a nonresident, also chapter 4. See *In re James*, 144 N. Y. 6, 38 N. E. 961.

<sup>85</sup> For the taxation of estates in expectancy or possession under the retroactive clause (Act 1892, c. 399, § 1, subd. 3), see the subject considered post, § 58, subds. c, 3f; also, *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>86</sup> *In re Vinot's Estate* (Surr.) 7 N. Y. Supp. 517; *In re Van Rensselaer*, N. Y. Law J. May 28, 1889; *In re Cogswell*, 4 Dem. Sur. 248; *In re Le Fever*, 5 Dem. Sur. 184; *In re Higgins' Estate*, 36 N. Y.

equal, in the construction of wills the general rule is to favor the vesting of estates as of the death of the testator, rather than a suspension of the gift or devise.<sup>87</sup> But a mere technical vesting of the nominal fee in estates in remainder of a contingent nature does not authorize their taxation as of the time of death. It was never intended by the law to tax a theory having no real substance behind it. The law itself gives abundant evidence in its language of the intent to subject only real and beneficial

Daily Reg. 906: *In re Grover's Estate* (Surr.) 34 N. Y. Supp. 474. See note on "Vested Estates," etc., 18 Abb. N. C. 300, where it is said: "Limitations of future or contingent interests in personal property are subject to the same rules so far as prescribed in 1 Rev. St. p. 722, etc., in relation to future estates in land [Id. p. 773, § 2]. But, notwithstanding this provision, the distinction between what is termed 'vesting' in the one case and in the other continues. The term 'vested' is constantly used of legacies to indicate more than not being contingent, in the common use of that term, as to estates in real property, viz. to indicate one which is not subject to be divested,—one that is not defeasible from lapse of time or otherwise. A legacy is not said to be vested except when the legatee, if sui juris, has power to extinguish by release or give perfect title by assignment. \* \* \* Where words of futurity are annexed to the substance of the gift, and there is nothing in the will to manifest a different intention, the gift itself will be deemed future, and the question of who is the beneficiary will be deemed dependent upon that state of facts when that future time shall arrive; and in this class of cases \* \* \* the legacy is said meanwhile not to be vested, although, if it were an estate in real property given by the same language, it would technically be called a 'vested' as distinguished from a 'contingent' remainder." *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906; reversed, see note 85, p. 282; *In re Curtis*, 142 N. Y. 219, 36 N. E. 887; Id., 73 Hun, 185, 25 N. Y. Supp. 909; *In re Hoffman's Estate*, 145 N. Y. 334, 38 N. E. 311; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394. See the subject further considered, chapter 5. See *Com. v. Smith*, 20 Pa. St. 100; *Com. v. Eckert*, 53 Pa. St. 105; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900.

<sup>87</sup> *Thomson v. Hill* (Sup.) 33 N. Y. Supp. 812; *Jaudon v. Hayes*, 79 Hun, 455, 29 N. Y. Supp. 958.

interests to taxation, and nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received.<sup>88</sup> It does not follow because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest. Until that time arrives, the power to tax does not exist.<sup>89</sup>

In disposing of questions under these tax acts the legal divisions of estates as classified and defined in the Revised Statutes do not control, but the language referring to the character of the estates that should be taxed must be taken in its ordinary and popular sense; and where the act provides for a transfer tax as against those who become "beneficially entitled in possession or expectancy," it was intended by the legislature not to tax a mere legal estate or interest, which might or might not ripen into a beneficial one. The obligation to pay the tax was not to be imposed except upon one who has "a present enjoyment, or a fixed and absolute right of future enjoyment," of property.<sup>90</sup>

Where a wife was, with her husband, tenant by the entirety of certain real estate under decedent's will, her interest, being certain and ascertainable, and being substantially that of a vested remainder under the statute, is taxable during her husband's lifetime, especially as by law<sup>91</sup> she has power to make immediate partition of her share.<sup>92</sup>

<sup>88</sup> Finch, J., in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887; *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906.

<sup>89</sup> In *re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281.

<sup>90</sup> *Talmadge v. Seaman*, supra; In *re Tobias*, N. Y. Law J. Feb. 8, 1895.

<sup>91</sup> Laws N. Y. 1880, c. 472.

<sup>92</sup> In *re Higgins*, supra. But see, as construing this statute, *O'Connor v. McMahon*, 54 Hun, 66, 7 N. Y. Supp. 225; *Stelz v. Schreck* (Sup.) 10 N. Y. Supp. 790; *Beach v. Hollister*, 3 Hun, 519. See *Newell v. Newell*, 7 Ch. App. 253.

A devise of premises to E., "and at her decease to become the property of her son G.," gives E. a life estate, and a vested remainder to G., which is appraisable and taxable.<sup>93</sup>

(b) *Contingent or Future Estates.*

Where, as we have seen,<sup>94</sup> for any reason it becomes impossible to appraise or value at decedent's death any contingent or future estate devised to take effect upon the termination of a preceding estate, or upon any uncertain event, or it cannot be determined to whom such contingent interest will pass, no tax can then be imposed upon such contingent interest until it actually vests in the possession or enjoyment of the heir, devisee, or beneficiary.<sup>95</sup>

This was the rule announced under the statutes in force prior to 1892, and it was said that in such cases the provision of the statute requiring the remainder-men to file the conditional bond was not applicable.<sup>96</sup> Substantially the same rule is adopted in Pennsylvania.<sup>97</sup>

<sup>93</sup> In re Grover's Estate (Surr.; 1895) 34 N. Y. Supp. 474.

<sup>94</sup> Chapter 5, § 54, subd. d.

<sup>95</sup> In re Cager's Will, 111 N. Y. 343, 18 N. E. 866; In re Stewart, 131 N. Y. 277, 30 N. E. 184; In re Curtis (1894) 142 N. Y. 219, 36 N. E. 887, affirming 73 Hun, 185, 25 N. Y. Supp. 909; In re Roosevelt's Estate, 143 N. Y. 120, 38 N. E. 281, affirming 76 Hun, 257, 27 N. Y. Supp. 741; In re Hoffman's Estate, 143 N. Y. 334, 38 N. E. 311, affirming 76 Hun, 399, 27 N. Y. Supp. 1086; In re Le Fever, 5 Dem. Sur. 184; In re Wallace (Surr.) 4 N. Y. Supp. 465, 466, citing In re Bruce (not reported); In re Millward's Estate, 6 Misc. Rep. 425, 27 N. Y. Supp. 286; Talmadge v. Seaman, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as In re Seaman (Oct. 8, 1895; Ct. App.) 41 N. E. 401; In re Wheeler's Estate, 1 Misc. Rep. 450, 22 N. Y. Supp. 1075. Form of order in such cases given under acts of 1885 and 1887. In re Cogswell, 4 Dem. Sur. 248; In re Hopkins, 6 Dem. Sur. 1; In re Le Fever, supra; In re Surrogate of Cayuga Co., 46 Hun, 657; In re Clark (Surr.) 5 N. Y. Supp. 199; In re Fleming's Estate, N. Y. Law J. Oct. 15, 1889; In re Benjamin, 36 N. Y. Daily Reg. 906.

<sup>96</sup> In re Cager, 111 N. Y. 349, 350, 18 N. E. 866; In re Lord, 10 N. Y. Law J. 260.

<sup>97</sup> In re Nieman's Estate, 131 Pa. St. 346, 18 Atl. 900. But see In (285)

In *Re Cager*,\* which is the earliest case upon this subject, decedent, Cager, left a life estate to his widow in the property devised, giving her, however, a limited power of disposition during life over the corpus of the estate, with remainder over of what should remain to collateral heirs; and it was ruled that, as she had power during life to dispose of the whole estate by any means except by will, any interest in the other legatees was wholly dependent upon whether the power of disposition<sup>98</sup> was exercised by the life tenant during her lifetime,<sup>99</sup> and that while it was possible that the remainder-men might eventually take a valuable estate under the will, that event, being contingent upon the nonexercise by the widow of the power of disposition, rendered the present appraisable value of such interest impossible of any correct or reasonable approximate valuation, and hence it was not liable to taxation. The court said: "When the question as to whether any property at all shall pass under the limitation over, and if so, how much, depends upon the will of the

*re Brewer's Estate*, 15 Pa. Law J. (N. S.) 433, 435, 16 Pa. Law J. (N. S.) 114.

\* 111 N. Y. 349, 350, 18 N. E. 866.

<sup>98</sup> By Rev. St. N. Y. (Banks' 8th Ed.) p. 2446, it is provided:

"Sec. 81. Where an absolute power of disposition not accompanied by any trust shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee absolute in respect to the rights of creditors or purchasers, but subject to any future estate limited thereon in case the power should not be executed, or the lands should not be sold for the satisfaction of debt."

"Sec. 85. Every power of disposition shall be deemed absolute by means of which the grantee is able in his lifetime to dispose of the entire fee for his own benefit."

<sup>99</sup> Citing *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771; *Smith v. Van Ostrand*, 64 N. Y. 278; *Terry v. Wiggins*, 47 N. Y. 512. See, also, *In re Le Fever*, 5 Dem. Sur. 24. As to when husband does not take an estate in fee, etc., see important case *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467. As to what constitutes power of disposition in life tenant, see *Flanagan v. Flanagan*, 8 Abb. N. C. 416; *Wager v.*



first taker, we are unable to see any rule by which such value (of the contingent estate) can be ascertained."

In such cases it was held that, there being no basis upon which the value of the devise over could be appraised, there was no foundation for the imposition of the tax.<sup>100</sup>

So where the widow, as life tenant, has a right to use the principal to make up a deficiency in the income allowed her under the will, and it appears that the whole estate may be absorbed during her lifetime, there can be no taxation of the remainder.<sup>101</sup>

And where decedent bequeathed the residue of her estate to her executor, in trust to collect, invest, and pay the net income to her brother for life, with discretionary power to expend certain sums annually for his support, with remainder to collaterals, the court said:<sup>102</sup> "It is impossible to determine how long he (the life tenant) may live, and how much of the principal fund may be used for him by the executor in the exercise of the limited discretion conferred upon him by will; indeed, it is possible that the whole residuum may be exhausted in the use of the discretionary power."<sup>103</sup>

And where the remainder-men take upon the contingency of surviving the life tenant, or of reaching a certain age, their interests are not taxable at decedent's death, but only at the time the contingency happens;<sup>104</sup> the rule

Wager, 96 N. Y. 174; *Livingstone v. Murray*, 68 N. Y. 486; *Ackerman v. Gorton*, 67 N. Y. 63; *Haynes v. Sherman*, 117 N. Y. 233, 22 N. E. 938; *Thomas v. Wolford* (Sup.) 1 N. Y. Supp. 610.

<sup>100</sup> *In re Cager's Will*, 111 N. Y. 349, 350, 18 N. E. 866.

<sup>101</sup> *In re Fleming's Estate*, N. Y. Daily Reg. Oct. 15, 1889. See *In re Leavitt* (Surr.) 4 N. Y. Supp. 179; *In re Millward's Estate* (Surr.) 27 N. Y. Supp. 286.

<sup>102</sup> *In re Hopkins*, 6 Dem. Sur. 1.

<sup>103</sup> As to discretionary powers, see *In re Stewart*, 131 N. Y. 586, 30 N. E. 184; *Id.* (Surr.) 10 N. Y. Supp. 15; and post, § 60.

<sup>104</sup> *In re Wallace's Estate* (Surr.) 4 N. Y. Supp. 465; *In re Bruce*,

in one case being announced that a contingent remainder is neither appraisable nor taxable until the defeating contingency has been forever rendered impossible of occurrence.<sup>105</sup>

These rulings, under the early statutes in force until 1892, were, in all respects, subsequently confirmed in elaborate opinions by the court of appeals in *Re Curtis*, and other cases.<sup>106</sup>

In that case the question arose under the act of 1885.<sup>107</sup> The facts were that the will of C. created trusts for the benefit of her two daughters, each trust for the life of the beneficiary. The remainders were given, one-half to such of her nephews, and one-half to such of her nieces, named, as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue, to such issue. It was held that the remainders were not liable to taxation under the act until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable or to others in whose possession it would be exempt, as, in case of the death of the nephews or of the nieces named prior to the expiration of the trust, the one-half of the remainder would go to the heirs at law of the testatrix; also

cited in 4 N. Y. Supp. 466 (not reported); In *re Le Fever*, 5 Dem. Sur. 184; In *re Matthews' Estate*, N. Y. Law J. July 27, 1889; In *re Fleming's Estate*, N. Y. Law J. Oct. 15, 1889; In *re Benjamin's Estate*, 36 N. Y. Daily Reg. 906.

<sup>105</sup> In *re Le Fever*, *supra*; In *re Benet*, N. Y. Law J. March 4, 1889.

<sup>106</sup> 142 N. Y. 219, 36 N. E. 887 (1894), affirming 73 Hun, 185, 25 N. Y. Supp. 909; In *re Roosevelt's Estate* (1894) 143 N. Y. 120, 38 N. E. 281, affirming 76 Hun, 257, 27 N. Y. Supp. 741; In *re Hoffman's Estate* (1894) 143 N. Y. 327, 38 N. E. 311, affirming 76 Hun, 399, 27 N. Y. Supp. 1086. See, also, *Talmadge v. Seaman*, 85 Hun, 242, 32 N. Y. Supp. 906, reversed as In *re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>107</sup> Laws 1885, c. 483.

that, conceding there was, upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate.

Finch, J., said: “ \* \* \* Until the end of the trusts, it cannot be determined whether the property passing by the remainders will be taxable at all; that is to say, whether it will pass actually and beneficially to persons in whose hands it will be taxable, or to others in whose possession it will be exempt. If in the end these remainders go to the nephews and nieces, a tax will be imposed; but if, instead of passing to them, the remainders should go to the children and grandchildren, they would be exempt from taxation. Under this will, however, while we may speculate as to the technical location of the fee pending the running of the trusts, the actual and beneficial interests in remainder may pass wholly to the two daughters by intestacy. If, before the termination of the trusts, the two nieces, children of R., should die without leaving issue or issue living at the supposed date, the will would fail to operate upon one-half of the estate in remainder, and that would devolve at once upon the two daughters as heirs or next of kin. In like manner, if the three nephews should die without issue living, as one of them already has, the other half of the remainder would take the same direction; so that until the termination of the trusts it will be impossible to know whether the remainders are in truth taxable or not. Prior to that event, the state cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable; and, until it can show that vital and necessary fact, its right to tax cannot arise. A time will come, at the close of the trusts, when the question can be settled; and, if then the property passes to the nephews and nieces, the proper assessment can be made and collected. \* \* \* The only possible answer is

that made by the surrogate. He says that the remainders vested in the nephews and nieces at once upon the death of the testatrix, and so became contingent interests, taxable under the law. If that technical vesting be admitted, what so passed was rather a theoretical possibility than a tangible reality, for the life estate was in the trustee of the daughters carrying the whole beneficial use. There was no power over it in the contingent remainder-men; and the nominal and technical fee might never become a taxable estate. It was never intended by the law to tax a theory having no real substance behind it. As was said in *Re Swift*,<sup>108</sup> the question of taxation is one of fact, and cannot turn on theories or fictions. This case illustrates one result of the contrary doctrine. W. R., a nephew named, had died without issue. He never took anything beneficial under the will, and his estate can take nothing, and yet it is assessed for about \$1,000, which, it is said, will more than exhaust all that he left, and in return for which he received actually nothing, and theoretically only an unsubstantial legal fabric. That is too unjust to be borne. \* \* \* The law itself gives abundant evidence in its language of the intent to subject only real and beneficial interests to taxation, and nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received."

"When it is only in the chance of uncertain future events that such an interest will alight where it will be taxable at all, a delay until the contingency is solved is necessary and proper."

The question was again considered in *Re Roosevelt's Estate*,<sup>109</sup> under the act of 1887. In that case decedent's residuary estate was given to his executors in trust to

<sup>108</sup> 137 N. Y. 86, 32 N. E. 1096.

<sup>109</sup> 143 N. Y. 120, 38 N. E. 281.

pay the income to his wife for life, and at her death the estate was given to other beneficiaries, subject to seven life annuities, with interests in these latter, in the nature of cross remainders, contingent upon survival inter sese. In confirming the ruling of the supreme court<sup>110</sup> that the annuities and contingent remainders were not taxable at decedent's death, Bartlett, J., in the court of appeals, said:

"Two questions are presented for our determination, viz.: First, are the annuities created by the will such property, in a legal sense, as to be presently taxable, and can their fair market value at the time of decedent's death be ascertained? second, is the fair and clear market value, at the time of testator's death, of the estates in remainder, ascertainable, and is the tax thereon due at once? In deciding both of these questions we are to reasonably construe the statute, and give effect, if possible, to all its provisions. As to the annuities, the appellant's counsel contends that they are entitled to an interest in or income from the property of the testator, and the statute requires the tax to be paid immediately. \* \* \* It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result.

"It does not follow because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest. Until that time arrives the power to tax does not exist. The testator has created seven life annuities if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive, a portion may be living, every one may be dead. To hold such a possibility

<sup>110</sup> 76 Hun, 257, 27 N. Y. Supp. 741.

presently taxable, and its value capable of immediate computation, shocks the sense of justice. This brings us to the remaining question of the taxation of the estates in remainder. The testator has, on the death of his wife, given his entire estate to 12 nephews and nieces, subject to the payment of the annuities. Two of these remainder-men died before the testator. It is contended by the respondents that it is impossible to ascertain the fair and clear market value of these remainders at the time of the death of the testator, for the reason that the annuitants represent estates or interests, unvested and contingent, which, taken in connection with the life estate of the widow, renders the present value of the ultimate remainders unascertainable. The amount that will ultimately be paid to the remainder-men is contingent, depending on future events.

"Whenever the tax on annuitants is payable the estate must pay it. What the amount of the tax will be depends upon the survivorship of annuitants, and the number of life annuities, if any, that shall vest on the death of the widow.

"This court has recently decided that it is not the vesting of remainders that renders them contingent, taxable interests under the law.<sup>111</sup> In the case cited it was held that the nominal fee might never become a taxable estate, for the reason that, if the nephews and nieces in whom it was claimed to have vested died without issue before the termination of certain trusts, the fee would pass to lineals, not taxable. This was the uncertainty which postponed the payment of the tax. In case at bar there is a contingency affecting the value of the estate, as already indicated, which brings it strictly within the principle of the Curtis Case."

So the same doctrine was announced in the recent Case

<sup>111</sup> In re Curtis, 142 N. Y. 219, 36 N. E. 887.

of Hoffman.<sup>112</sup> In this case the income of a certain fund was bequeathed to the testatrix's mother for life, and, upon her death, such income was bequeathed to testatrix's daughter for life, and upon her death the principal sum was directed to be paid to her issue. If no issue survived her, she having survived testatrix's mother, then, upon her death without issue, one-half of the fund should be paid to a niece of testatrix and the other half to another niece. It was further provided that, in case of the death of the daughter before testatrix's mother, the fund should go to the issue of such daughter, if any. If no issue survived said daughter, one-half each of said fund should go to said nieces or their legal representatives.<sup>113</sup>

Finch, J., said: "As to the estates of the daughter Ella and the granddaughter Olga, we agree with the conclusions of the general term. By the will the mother took a life estate. If upon her death Ella survives, the latter will take a life estate, but, if she dies before her mother, Ella will take nothing, and have no estate to be taxed. In that event there will be no actual transfer to her of any portion of the property of decedent. She ought not to be taxed until events make it certain that there is an actual and beneficial transfer of the property to her. The remainder goes to Olga, if she is living at the death of her mother; but, if she is then dead without issue, that remainder goes to certain nephews and nieces. If it goes to her, it will be taxable at one per cent., but, if to the collaterals, then at five per cent."<sup>114</sup> Until events determine the question, it cannot be known what tax is chargeable, nor by whom it is payable. Our decision in *Re Cur-*

<sup>112</sup> 143 N. Y. 334, 38 N. E. 311, affirming 76 Hun, 399, 27 N. Y. Supp. 1086; *Talmadge v. Seaman*, *supra*.

<sup>113</sup> See 76 Hun, 399, 27 N. Y. Supp. 1086, for provisions of the will in this case.

<sup>114</sup> This under the act of 1892, Appendix, I. e.

tis<sup>115</sup> is not decisive, because the facts are essentially different; but in that case I expressed what was our decided drift of opinion in cases more like the present, and fairly settled later in *Re Roosevelt's Estate*.<sup>116</sup> We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose, and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership.

“For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate ‘for a term of years or for life or determinable upon any future or contingent estate’ or ‘a remainder, reversion, or other expectancy,’ and the tables of mortality may be resorted to for the ascertainment of values. And yet it is the ‘fair market value,’ the ‘fair and clear market value,’ which is to be assessed, and with the proviso that, if that value cannot be at once ascertained, the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an ad-

<sup>115</sup> 142 N. Y. 219, 36 N. E. 887.

<sup>116</sup> 143 N. Y. 120, 38 N. E. 281.



jourment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt, and yield sums which no sale in the market would produce. My judgment is further guided by the very significant definition of the word 'transfer' in section 22. It 'shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future.' It thus contemplates a present enjoyment, or a fixed and absolute right of future enjoyment, and adjourns the appraisal until the fulfillment of contingencies leaves those results attained. Here there must be that adjournment until the rights of Ella and Olga become fixed and actual. The result does no injustice to the state. The trust fund must remain in the hands of the executors to feed the life estates and for payment over of the remainder. The executors must pay the tax when they know against whom it is chargeable, and the rate to be assessed. The state will get its tax when the legatees get their property."

So the value of a bequest to testator's widow for life, or until she marries again, cannot be determined for the purpose of taxation under the transfer tax law until the termination of the widow's estate by death or marriage. "While we have an established method for ascertaining the value of the life estate of a widow, based upon an arbitrary rule as to probable time of death, there is lacking any such rule to enable us to approximate the period, when, if at all, she may remarry. That defies all calculation. Hence the value of her estate or of the remainder cannot now be ascertained for the purpose of the assessment of the tax."<sup>117</sup>

Where the business of the partnership testator was concerned in was to be continued by the executors till it could

<sup>117</sup> Coffin, S., in *Re Millward's Estate* (1894) 6 Misc. Rep. 425, 27 N. Y. Supp. 288.

be disposed of to advantage, and this course was essential to realizing the full value of it, the assessment and collection of the tax was postponed until the beneficiaries came into actual possession.<sup>118</sup>

A devise of a remainder after a life estate, if the person named as a remainder-man be then living with limitation over in case he then be dead, is not taxable during the lifetime of the life tenant.<sup>119</sup>

(c) *When not Taxable nor Appraisable at Death.*

So, under recent rulings, and under the act of 1892, such future or contingent interests are neither taxable nor appraisable where the value cannot be ascertained at the decedent's death, and not until they vest in the actual possession or enjoyment of the beneficiary, or until the contingency happens.<sup>120</sup>

The act of 1892<sup>121</sup> provides that if the taxable property shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof, at that time; provided, however, that when such estate, income, or interest shall be of

<sup>118</sup> *In re Wheeler's Estate*, 1 Misc. Rep. 450, 22 N. Y. Supp. 1075.

<sup>119</sup> *In re Westcott's Estate* (1895) 11 Misc. Rep. 589, 33 N. Y. Supp. 426; following *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311.

<sup>120</sup> See Appendix. I. e, Laws 1892, c. 399, §§ 3, 7, 11, 13, 22; *In re Curtis*, 142 N. Y. 223, 36 N. E. 887; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311; *In re Millward's Estate* (1894) 6 Misc. Rep. 425, 27 N. Y. Supp. 288, and cases *supra*.

<sup>121</sup> Act 1892, *supra*.

such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The act further authorizes the state superintendent of insurance to determine the value of such estates by the rule, method, and standard of mortality and value employed by him in ascertaining the value of policies of life insurance and annuities, and his certificate is made conclusive evidence that the method of computation therein is correct.<sup>122</sup> The statute further provides that all taxes shall be due and payable at the time of transfer; provided, however, that taxes upon the transfer of any estate, property, or interest therein, limited, conditioned, dependent, or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

In *Re Curtis* <sup>123</sup> the question of the taxation of contingent estates was determined under the act of 1885, containing no such provisions as those above, but the question of the appraisement of such estates was not passed upon, although the court did say that a time would come at the close of the trusts when the question of their taxation could be settled, and if then the property passed to taxable persons the proper assessment could be made and collected. But O'Brien, J., in the court below,<sup>124</sup> said: "No appraisement of the contingent interests of the collateral relatives should be attempted to be made, nor any tax imposed thereon, until such interests become vested in possession, and by the removal of

<sup>122</sup> Laws 1892, c. 399, § 13.

<sup>123</sup> In re Curtis, supra.

<sup>124</sup> 73 Hun, 190, 25 N. Y. Supp. 909.

the contingency it appears whether they have so vested in parties liable to taxation or in parties exempt."

In *Re Roosevelt's Estate*<sup>125</sup> the question arose under the act of 1887, where there were contingent annuities and remainders. In deciding these questions in the negative the court said: "To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice. \* \* \* In the case at bar there is a contingency affecting the value of the estate, as already indicated, which is strictly within the principle of the *Curtis Case*."<sup>126</sup> And, in referring to the act of 1892,<sup>127</sup> said: "The legislature \* \* \* has given a practical construction to its previous legislation on this subject when it provides that, where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment."

In *Re Hoffman's Estate*<sup>128</sup> the question arose under the act of 1892. There were life estates, the income to be paid to the widow for life; and, if the daughter survived, to her for life, the principal at the expiration of the trust to be paid to the issue of the daughter, if any living, at her death; if none, then to two nieces of the testatrix. The testatrix died, leaving her mother, daughter, and a child of the latter surviving. In holding that the interests after the life estate of the mother were not taxable until they vested in the actual possession or enjoyment of the beneficiary in remainder, the court, per Finch, J., said with reference to the appraisement of such estates: "I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate for a term of years, or for life, or

<sup>125</sup> In *re Roosevelt's Estate*, *supra*.

<sup>126</sup> In *re Curtis*, *supra*.

<sup>127</sup> Chapter 399, § 3.

<sup>128</sup> 143 N. Y. 327, 38 N. E. 311.

determinable upon 'any future or contingent estate' or 'a remainder, reversion, or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases depending upon lives might still leave the 'fair and clear market value' in doubt, and yield sums which no sale in the market would produce." The court then referred to the definition of the word "transfer" in section 22,<sup>129</sup> saying: "It thus contemplates a present enjoyment, or a fixed and absolute right of future enjoyment, and adjourns the appraisal until the fulfillment of contingencies leaves those results attained."

(d) *When Appraisable at Death.*

Under the early statutes of 1885 and 1887, it was held that where, at the time of decedent's death, the value of the contingent interest or remainder could be ascertained, it was appraisable, but not taxable. This rule finds confirmation in the language of the act of 1892.<sup>130</sup>

The rule does not, it seems, conflict with the preceding rule (c), but, on the contrary, in certain cases, it would seem

<sup>129</sup> Laws 1892, c. 399.

<sup>130</sup> *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866; *In re Clark* (Surr.) 5 N. Y. Supp. 199; *In re Matthews' Estate*, N. Y. Law J. July 27, 1889; *In re Benet*, N. Y. Daily Reg. March 4, 1889; *In re Leavitt*, 4 N. Y. Supp. 179; *Appeal of Mellon*, 114 Pa. St. 573, 574, 8 Atl. 183; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900; *In re Brewer's Estate*, 15 Pa. Law. J. (N. S.) 433, 435, 16 Pa. Law J. (N. S.) 114; *In re Curtis*, 142 N. Y. 219, 36 N. E. 887.

that an appraisement can still be made as of the date of death, where the nature of the contingent interest is not of such a character as to preclude or be incapable of a valuation. It is only where it is impossible or impracticable to ascertain the value of the contingent devise that no appraisement can be then had. In *Re Curtis*,<sup>131</sup> decided under the act of 1885, the power to appraise at death was doubted where the interest was contingent; but the court said, "It may possibly be that where the only contingency of the future is upon which of several named persons or classes of persons, all of whom are liable to suffer the taxation, the beneficial interests will ultimately devolve, the appraisement and assessment need not be postponed, though even that is hardly a prudent construction, but need not now be discussed."

But this rule would seem to be sanctioned by the act of 1892<sup>132</sup> providing that the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; providing that when such estate, etc., shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first becomes ascertainable. The act thus seems to sanction the appraisement where the value can be ascertained.

In *Re Cager*, decided under the act of 1885, the court said: "Where the present value of the property which is devised to one with a limitation over to others, upon the happening of some event which may or may not occur, can be ascertained, then a ground upon which an approximate estimate of the value of the ultimate devise appears, and it may be

<sup>131</sup> 142 N. Y. 223, 36 N. E. 887.

<sup>132</sup> Chapter 390, §§ 3, 11, 13.

made." And the act enables a tax to be imposed and collected upon the ulterior devise through the medium of a bond to be given by the respective legatees, payable when they come into possession of the devised property.<sup>133</sup> Whether the failure in such a case to give the conditional bond required by the statute would make the tax due and collectible immediately has not been determined in this state.<sup>134</sup>

So, in *Re Clark*,<sup>135</sup> where the question arose as to the liability of contingent annuities to the tax, and when the tax thereon was payable, it was held that, while the value of such annuities could be and was ascertainable at decedent's death by appraisal, the tax thereupon was not payable until the annuities (conditioned to take effect upon

<sup>133</sup> Laws 1887, § 2, Appendix, I. a.

<sup>134</sup> See *In re Peck* (Surr.) 9 N. Y. Supp. 465; *In re Clark* (Surr.) 5 N. Y. Supp. 199; *In re Higgins' Estate* (Dec. 7, 1889) 36 N. Y. Daily Reg. 906. In cases arising under this provision of the statute of 1887 it does not seem to be the practice in New York to enforce the giving of the conditional bond, but it would appear that under the express language of the statute the tax becomes due and payable immediately if the remainder-man fails to exercise an election by filing the bond within one year after the death of the decedent. The point has, however, never been determined. See *In re Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 435, 17 Atl. 1094; *Appeal of Mellon*, supra; *In re Willing's Estate*, 2 Wkly. Notes Cas. 308; *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106. These authorities would seem to show that under the Pennsylvania law the tax becomes due immediately in such case, for in *Cooper's Estate* (Appeal of Commonwealth), supra, the court said: "The payment of the tax by remaindermen, which, before this act, was payable at the death of the decedent, may now, at their election, be postponed until they come into actual possession, upon proper security for its payment." See, also, *In re Fagely's Estate* (Appeal of Commonwealth) 128 Pa. St. 610, 18 Atl. 386.

<sup>135</sup> 5 N. Y. Supp. 199 (Surr.). See, also, *In re Hopkins*, 5 Dem. Sur. 1; *In re Bruce*, cited in 4 N. Y. Supp. 466, but not reported. *In re Le Fever*, 5 Dem. Sur. 185.

the death of the life tenant before the annuitants) actually vested by the death of such life tenant.

Ransom, S., in referring to *In re Cager*, said:

"Nothing is said about the assessment or payment of the tax, although the court said that contingent estates might be appraised if their value could be ascertained. The question is, can the tax be assessed and fixed? The executor cannot diminish the funds which produce the annuities.<sup>136</sup>

"The contingent annuitants cannot be required to pay for something they may never receive. The act does not say that where property is left to A., an exempt person, for life, with a contingent life estate to B., that A. shall be taxed to pay for B.'s prospective enjoyment, even though B. may never receive it. The act expressly exempts certain persons, and taxes others, and it cannot be rightfully held that where property was left for life to an exempt person, and, after his death, for life to one not exempt, should she survive, in that event the corpus of the estate which is exempt should be diminished by the amount of the tax upon the happening of an event which would not make the life tenant liable to the tax whether it did or did not happen, and which, if the contingency should fail, might throw the estate back to persons who were exempt. Neither the first estate nor the last should be taxed for the contingent second estate. It must be in cases such as this, where it is absolutely impossible to decide to whom the property will go, that the intention is that the appraiser shall report the fair market value of the property at decedent's death, and that the matter must be regarded as suspended until the contingency does or does not happen, at which time—that is, at death of the life tenant—it can be determined to

<sup>136</sup> But see *In re Johnson*, 6 Dem. Sur. 146; *In re Leavitt's Estate* (Surr.) 4 N. Y. Supp. 179.



whom the property will pass, and whether or not it is subject to the tax."<sup>137</sup>

So, where decedent left to a collateral heir property to be given him when he arrived at age, and the income of the fund in the meantime, with a proviso that upon his death before reaching 21 the whole fund should become part of the residuary estate, held that, while the fund was subject to appraisement as of decedent's death, it was not subject to taxation until the contingency occurred;<sup>138</sup> but where two legatees, husband and wife, were tenants by the entirety under the will in certain real estate, it was held that, the wife's interest being known, the property definite, and the event certain, and as she had an interest capable of assignment and partition,<sup>139</sup> her estate was both appraisable and taxable at once.<sup>140</sup>

*(e) Appraisable and Taxable when Vesting in Possession or Enjoyment.*

Where, in any case, at decedent's death no appraisement of the estate in remainder or future estate can be had for any reason, the tax may, nevertheless, be imposed, and payment enforced upon an appraisement had at the time the estate or interest accrues, to wit, when it vests in actual possession or enjoyment.<sup>141</sup>

Under these acts the surrogate has power to appoint an

<sup>137</sup> In re Clark, supra. See In re Bruce, cited in 4 N. Y. Supp. 466; In re Stewart (Surr.) 10 N. Y. Supp. 15; Id., 131 N. Y. 281, 30 N. E. 184; In re Le Fever, 5 Dem. Sur. 185.

<sup>138</sup> In re Matthew's Estate, N. Y. Daily Reg. July 27, 1889; In re Benet's Estate, N. Y. Daily Reg. March 4, 1889; In re Van Rensselaer's Estate, N. Y. Daily Reg. May 26, 1889; In re Wilkins' Estate, N. Y. Daily Reg. Dec. 7, 1889.

<sup>139</sup> Laws N. Y. 1880, c. 472.

<sup>140</sup> In re Higgins, 36 N. Y. Daily Reg. 906, and cases cited supra.

<sup>141</sup> In re Curtis, 142 N. Y. 219, 36 N. E. 887; In re Roosevelt's Estate, 143 N. Y. 120, 38 N. E. 281; In re Hoffman's Estate, 143 N. Y. 334, 38 N. E. 311; Talmadge v. Seaman, 85 Hun, 242, 32 N. Y.

appraiser "as often as and whenever occasion may require,"<sup>142</sup> to fix the fair market value, at the time of the transfer thereof, of property of persons whose estates shall be liable to taxation; and where the estate or interest is contingent the property shall be appraised immediately after such transfer, or as soon thereafter as may be practicable,<sup>143</sup> provided that when such estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable.

In the Cager Case, which arose under the act of 1885, while the court expressly declined to determine the point as to whether an appraisal of the value of the contingent estates could be made when they eventually came to the possession of the devisees, it suggested that the tax might be altogether lost to the state if an appraisal was not allowed immediately; but the remarks in that case have, it seems, been properly treated as obiter,<sup>144</sup> and it would appear that the scope and object of the provision of the statute allowing an appraisement as often as and whenever occasion might require,<sup>145</sup> was overlooked.

Supp. 906, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184; *Id.* (Surr.) 10 N. Y. Supp. 15; *In re Wallace's Estate* (Surr.) 4 N. Y. Supp. 465; *In re Bruce*, cited in 4 N. Y. Supp. 466; *In re Le Fever*, 5 Dem. Sur. 184; *In re Fleming*, N. Y. Law J. Oct. 15, 1889; *In re Clark*, 5 N. Y. Supp. 199. See *Mellon's Appeal*, 114 Pa. St. 570, 8 Atl. 183; *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900, and cases cited *supra*, p. 163. *Contra*, but obiter, *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866; *In re Hopkins*, 6 Dem. Sur. 1.

<sup>142</sup> Cases *supra*. And see Laws 1885, c. 483, § 13; Laws 1887, c. 713, § 13; Laws 1892, c. 399, § 11.

<sup>143</sup> Laws 1892, c. 399, § 11.

<sup>144</sup> *In re Stewart*, and cases *supra*.

<sup>145</sup> Laws 1887, c. 713, § 13; Laws 1892, c. 399, § 11. See *Com. v. Freedley*, 21 Pa. St. 33; and chapter 5, § 55.

In *Re Stewart*<sup>146</sup> the decedent left a portion of her residuary estate to a trustee with power of appointment<sup>147</sup> to and among such of the legatees and in such proportion as he might deem fit. Four years after her death the trustee made an appointment of the property among certain of the collateral legatees, who claimed their shares were not subject to taxation, upon the ground that the act contemplated only the taxation of interests which accrued at the decedent's death, and for the reason that the shares were not determinable until the power of appointment had been exercised. Surrogate Ransom, in holding the shares taxable, said: "It is true that at the date of the death of Mrs. Stewart the appraiser could not determine either the value of the estate which might eventually become taxable, or the persons to whom it would pass; and he could not, therefore, make any appraisal. It has been the practice of this court to suspend all proceedings as to such contingent estates until such contingency happens, with a view to the appointment of an appraiser at that time to make the appraisal."<sup>148</sup> The claim that at the death of this decedent there was no estate that could be held subject to the tax, and that, therefore, there can be no tax assessed now, cannot be sustained. It is a well-settled principle of the law that where parties take under a power of appointment they take under the instrument creating the power, so that the parties named by H. under the power given him must be regarded as the persons selected by Mrs. Stewart.<sup>149</sup> It is true that their interests did not accrue until the date when the power was

<sup>146</sup> 10 N. Y. Supp. 15 (Surr.).

<sup>147</sup> As to powers, see post, § 60.

<sup>148</sup> Citing *In re Wallace* (Surr.) 4 N. Y. Supp. 465; *In re Clark* (Surr.) 5 N. Y. Supp. 199.

<sup>149</sup> See *In re Stewart*, 131 N. Y. 274, 30 N. E. 184, citing 4 Kent, Comm. 338; *Jackson v. Davenport*, 20 Johns. 537; 2 Sugd. Powers, p. 22.

exercised, \* \* \* at which date also the tax upon their interests accrued.”<sup>150</sup>

In confirming this ruling the court of appeals said:<sup>151</sup> “The contention on the part of the appointees under the power is that the scheme of the statute only contemplates cases where the interests created are capable of valuation at the death of the testator. This would exclude all future contingent interests, in real or personal property, created by will. Such an intention certainly was not in the mind of the legislature, and we are asked to exclude this large number of cases from the operation of the act upon a construction which imports into the thirteenth section<sup>152</sup> the limitation contained in section 2. The claim of the appointees under the power must be allowed if the statutes provide no scheme for taxation of contingent and uncertain interests, although such interests may be within the purview of the first section. It is not enough for the legislature to declare that such interests are taxable. If no mode is provided for assessing and collecting the tax, the law is imperfect, and cannot as to such interests be executed. But we think that the thirteenth section does include cases like the present, and that contingent interests given by a will, which, after the death of the testator, are converted, by the happening of the event upon which they are limited, into actual vested estates, may then be appraised and taxed under the provisions of section 13. It is true that section 4 seems to contemplate that all taxes are ascertainable at the death of the decedent, since it declares that ‘they shall be due and payable’ at that time, and provides for charging interest thereon from ‘the time the tax accrued.’ We think the implication from this section ought not to overbear the

<sup>150</sup> See, also, *Com. v. Freedley*, *supra*; *Com. v. Williams*, 13 Pa. St. 29.

<sup>151</sup> *In re Stewart*, 131 N. Y. 284, 30 N. E. 181.

<sup>152</sup> Laws 1887, c. 713.

intention of the legislature, indicated in section 1, to subject all interests derived under wills to taxation, except those within the exception; nor prevent such a construction of section 13 as will bring the present case within its purview."

(f) *Estates Taxable under Retroactive Clause New York Act of 1892.*

By the New York transfer tax act of 1892<sup>153</sup> it seems that the tax is, in some instances, intended to be retroactive, the statute providing that "such tax shall also be imposed when any such person or corporation becomes beneficially entitled in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of the act." The provision includes both transfers by will and by deed.<sup>154</sup> While this is an important provision, its meaning and scope with reference to the taxation of estates, where the transfer, will, or deed was made before, and the death occurred after, the passage of the act, has not yet been passed upon by the court of appeals. A similar question, however, arose under the English succession duty act, also under the acts of congress, to which we shall hereafter refer.<sup>155</sup> The general rule is that legislative acts are always construed as prospective in operation, unless, by their language, it appears that it was the intention that they should have a retroactive effect.<sup>156</sup>

<sup>153</sup> Chapter 399, § 1, sub l. 3.

<sup>154</sup> *Talmadge v. Seaman*, 85 Hun. 242, 32 N. Y. Supp. 906, reversing 30 N. Y. Supp. 304. This case has been argued before the court of appeals, and reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401. See *In re Gomez*, 12 N. Y. Law J. 1637; *In re Brooks* (Surr.) 32 N. Y. Supp. 177; *In re Tobias* (Feb. 8, 1895) 12 N. Y. Law J. 1164.

<sup>155</sup> Post, note 170 et seq.

<sup>156</sup> *Sherrill v. Christ Church of Poughkeepsie* (1890) 121 N. Y. 701, 25 N. E. 50, reversing 55 Hun. 472, 8 N. Y. Supp. 806; *In re Miller's Estate*, 110 N. Y. 223, 18 N. E. 139; *In re Cogswell*, 4 Dem. Sur. 248; *Talmadge v. Seaman* (March, 1895) 85 Hun. 242, 32 N. Y. Supp. 906; *Roman Catholic Church of the Transfiguration v. Niles*

In the construction of this portion of the act the proper inquiry would seem to be as to when the beneficial interest took effect. If it vested in possession upon a death before the act passed, then clearly it should not be held liable to taxation,<sup>157</sup> unless the act is retroactive. If such interest vested after the passage of the law, it is liable, though created by will or deed, and upon a death occurring before the act was passed.

But the words "by any such transfer, whether made before or after the passage of the act," would seem to be plainly retroactive, so far as transfers made before the passage of the act are concerned, and it would seem to have been the intention of the law to embrace and include every taxable interest liable at and prior to the passage of the act, in order that no estates liable under the former acts should escape taxation by the repeal of the laws in existence prior to the act of 1892.<sup>158</sup>

Under a somewhat similar statute<sup>159</sup> it was provided that "any property heretofore devised or bequeathed to any person who is a bishop, or to any religious corporation, shall be exempted from and not be subject to the provisions of this

(1895) 86 Hun, 221, 33 N. Y. Supp. 243. See question of retroaction discussed and cases cited, chapter 2, § 24; chapter 8, § 69.

<sup>157</sup> See *In re Dreyfous* (Surr.) 18 N. Y. Supp. 767; *In re Wolfe*, 66 Hun, 389, 21 N. Y. Supp. 515, 522; *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>158</sup> See Laws 1892, c. 399, § 23, repealing Laws 1885, c. 488; Laws 1887, c. 713; Laws 1889, c. 307, 479; Laws 1891, c. 215. This intention is shown by section 24 of the act of 1892, containing a saving clause, thus: "The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May 1, 1892, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such law had not been repealed," etc. *In re Richardson*, N. Y. Law J. Jan. 31, 1893.

<sup>159</sup> Laws N. Y. 1892, c. 169.

act.”<sup>160</sup> The effect of this statute has been considered recently,<sup>161</sup> and it was substantially held to be retroactive upon the above language. “The language of the act is that property which had theretofore been devised or bequeathed should be exempt. The claim upon the part of the defendant that this language was intended to apply only to those cases where it had been impossible to assess the tax, because no appraisement could be made, is not borne out by anything contained in the statute. It applies to all sorts of property, in possession or in expectancy, and makes no distinction, and it was the evident intention of the legislature to release property which had been thus devised, from the provisions of the inheritance tax act, whether such devise had become operative prior to the passage of the act or subsequent thereto.”<sup>162</sup>

It was held in the Talmadge Case \*—the leading authority thus far on this question—that where the transfer “becomes beneficially entitled, in possession or expectancy,” to any property, “whether the transfer was made before or after the passage of the act, a contingent remainder, which vests after the passage of the act, though created by a will which took effect before that time, was taxable at the time of vesting.”<sup>163</sup> In that case testator died in 1876, when his will was admitted to probate. At the time of the making of the will, and at the time of death, the life tenants were liv-

<sup>160</sup> See Laws 1892, c. 309, § 2, where the same clause is re-enacted, the word “hereafter” being included.

<sup>161</sup> Roman Catholic Church of the Transfiguration v. Niles (1895) 86 Hun, 221, 33 N. Y. Supp. 243.

<sup>162</sup> See, as to power of state to release taxes, *People v. Commissioners of Taxes*, 142 N. Y. 348, 37 N. E. 116.

\* 32 N. Y. Supp. 906; recently reversed in Court of App. as *In re Seaman* (Oct. 8, 1895) 41 N. E. 401, the court holding that the act applies to grants or gifts *causa mortis* but does not embrace or render taxable interests taken under the wills of testators dying before the passage of the act.

<sup>163</sup> See note on “Vesting,” 18 Abb. N. C. 309. See *supra*, section 58, subd. 3a, and notes.

ing. The two life tenants died in 1893, after the passage of the act above mentioned. The question was, "Did the children of S. become beneficially entitled, in possession or expectancy," to the remainders of the funds held in trust for the life tenants, upon the termination of such life estate, and thus subject their interests to the payment of a tax? O'Brien, J., in an able and elaborate opinion in the supreme court, said: "While, in a strictly legal sense, persons having a vested or contingent, a feasible or infeasible, a possessory or expectant interest in property by will or deed, may be said to be 'beneficially interested' (which has been regarded as synonymous with 'beneficially entitled'), and thus answer the description of persons who, becoming 'beneficially entitled, in possession or expectancy,' to property would be liable to taxation, we do not think this is the meaning that is to be attached to the words as used in the act of 1892. As we have endeavored to point out, the latest expression of the court of appeals favors the view that for the purpose of taxation one only becomes beneficially entitled to property when the time arrives that he has the title, or is entitled to possession, or when a contingent interest vests, or when a defeasible estate becomes infeasible. While there are objections to, and possibly hardships in, such a construction, by rendering subject to a tax an interest or property which was free therefrom when created, it nevertheless presents the most practicable rule to be applied in the construction of acts relating to the taxing of inheritances." This being so, one should not be liable until he succeeds to the property, and the injury or injustice of a rule that would hold one liable or responsible for a tax upon property in which he might have a contingent interest, but which might never vest, has in many cases been pointed out.<sup>164</sup>

"We think, then, that, had the law of 1892 been in exist-

<sup>164</sup> See *In re Curtis*, 142 N. Y. 219, 36 N. E. 887; *In re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281. See *In re Tobias*, 12 N. Y. Law J. 1164.



ence at the time of the making of the will or the death of S., the interest of the children of G. ('remainder-men') would not then have been taxable, because they did not, within the meaning of the transfer-tax act, become beneficially entitled, in possession or expectancy, to the remainders of the funds held in trust during the lives of their aunt and father, respectively, until the termination of such life estates.

"As the tax is a burden placed permanently on the succession, and not upon the estate, if the act of 1892 had been in force when the testator died, the state could not have got its tax, because there was no certainty as to which of the children would eventually get the property, and the matter would have had to be deferred until the termination of the life estates. Here, before such termination, the law of 1892 was enacted; and as, by its provisions, the tax was to be imposed upon any one who became beneficially entitled, in possession or expectancy, to any property, whether the instrument under which such property was acquired was made before or after the passage of the act, we fail to see any valid reason why it should not apply in the present instance. \* \* \*

"By its language the act imposes a tax upon succession to property transferred by will prior to its passage, though the beneficial interest therein vests subsequent to its passage; and while this construction seems to give a retroactive effect to the act, which in all cases should, if possible, be avoided, its effect is retroactive only so far as the legal estate is concerned, but not as to the beneficial interest, which, in this case, did not spring into existence until after the passage of the act, and thus the persons entitled to succeed to the beneficial enjoyment of the property became liable for the tax. Our conclusions, therefore, are that this act imposes a tax upon successions to property transferred by will before the passage of the act, whenever any beneficial interest therein vests subsequent to its passage."

Where decedent died in 1859, giving his daughter a life

interest in a trust fund, with power of appointment over the principal of the fund by will, and the daughter died in 1893, appointing the fund, it was held liable to taxation under the above provision as against the beneficiaries under the power.<sup>165</sup>

In another case the testatrix died in 1849, when her will was admitted to probate. She devised her residuary estate to her executors in trust, to receive the income thereof and pay the same to her daughter E. during the life of the latter, and, upon her death, leaving lawful issue, then to convey the said trust estate to such issue; and in case of the death of E. without issue, leaving the testatrix's daughter M. surviving, the trust was to continue during the life of M., the income to be applied to her support, and after her decease the trustees were to transfer and convey the said trust fund to the children and lawful heirs of H., a deceased brother of testatrix, to share and share alike per stirpes. Both daughters died without leaving issue. E. died in March, 1885, and M. in December, 1893. In following the case of *Talmadge v. Seaman*, † the surrogate said: "In the present case it could not be determined who would become entitled to the eventual estate, upon the decease of the surviving life beneficiary, till that event happened; and, therefore, there was no vesting, at the time when the will took effect, which would have authorized the collection of the tax from these contingent devisees at that time, had the act of 1892 been then in force. No distinction in principle has been drawn by parties to this proceeding between this case and *Talmadge v. Seaman*"; and, upon authority of that case, the surrogate denied an application, by collateral relatives of decedent, for an adju-

<sup>165</sup> *In re Brooks' Estate* (Surr.) 32 N. Y. Supp. 176, citing *Jackson v. Davenport*, 20 Johns. 551; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184; *Attorney General v. Upton*, L. R. 1 Exch. 224; *In re Tobias*, *supra*.

† 32 N. Y. Supp. 906.

dication that the real estate passing to them under the will was not subject to any transfer tax.<sup>166</sup>

It has been also held that the liability, in the case of a transfer after the passage of the act of 1892, is imposed, in respect to the estate or interest which the party entitled thereto acquires, immediately upon the creation and inception of his interest, and not in regard to the character it may ultimately assume. If the interest or estate so acquired entitled its possessor to the immediate possession thereof, the liability to the tax, and the obligation to pay it, at once attached. Where the interest or estate so acquired was an estate or interest in expectancy, the liability to the tax immediately attached, although, if such estate or interest was of a contingent character, this liability might never become fixed or ripen into an actual obligation. The event upon which the vesting of an absolute title or the acquisition of the possession depended might never happen, and, in consequence, the beneficiary might never get anything. The event might, however, so turn out that what had been a contingent had become a vested estate, with the right of possession postponed. In such case the tax would accrue and be payable upon the happening of the event.<sup>167</sup> Neither this circumstance nor the fact that the cases cited decide that no tax can be imposed or levied, in respect to certain contingent interests, until they have actually come into possession, is opposed to the views above expressed as to the taxability of expectant interests and estates. The tax is imposed by the act with respect to these estates immediately upon their creation; but where the interests are uncertain and contingent the tax is postponed until the happening of the event. These are the same interests that are in like man-

<sup>166</sup> *In re Gomez*, 12 N. Y. Law J. 1637.

<sup>167</sup> *Laws 1892, c. 399, §§ 3-11; In re Curtis*, 142 N. Y. 120, 36 N. E. 837; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281.

ner made subject to the tax where they have been acquired by the beneficiaries, subsequently to the passage of the act, by a transfer previously made. It is with reference to the character of the interest or estate at the time of its origin or creation, and not what eventually may turn out to be its character, that the tax is imposed, in the case of a transfer before, as in the case of a transfer after, the passage of the act; and in both cases such interest or estate must have had its origin and inception subsequently to the passage of the act. Expectant estates, whether vested or contingent, existing at the time of the passage of the act, although they have afterwards become vested in interest or possession, are, therefore, not subject to the tax by the provision in question.<sup>168</sup>

These views, and those expressed in other cases,<sup>169</sup> seem to conflict in some particulars with the rule settled in the *Talmadge Case* in the construction of this statute, and also with the construction of a somewhat similar provision contained in the English succession duty act of 1853.<sup>170</sup>

This section has been held to be sufficiently comprehensive to include any benefit derived by any person, whether

<sup>168</sup> *In re Tobias*, 12 N. Y. Law J. 1164, per Fitzgerald, S.

<sup>169</sup> *In re Forsythe* (1894; Surr.) 32 N. Y. Supp. 175; *In re Tobias*, *supra*.

<sup>170</sup> 16 & 17 Vict. c. 51, § 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person entitled, and the term 'pre-

taking his title from a testator who died before or after the act, provided he succeeds in consequence of a death taking place subsequently.<sup>171</sup>

Under this act a question was raised as to whether a succession was created and duty attached on estates in which a person had a vested interest subject to the life interest of another who died after the act, and several decisions have been made, the most important of which is *Wilcox v. Smith*,<sup>172</sup> in which the testator, who died in 1827, left real estate to his son for life, who died in July, 1853, on whose death the estate passed to his son, the testator's grandson, who was held to be liable to succession duty.<sup>173</sup>

In another case the testator died in the year 1803, bequeathing a certain sum of money, in which he gave a life interest to his daughter, and on her death the capital to her children, who, therefore, took a vested interest at testator's death. She died in June, 1854, and it was held that a succession was created within the meaning of the act, and that the children were liable to duty.<sup>174</sup>

Under the same act it has been held that the appointee, under a general power of appointment which has taken effect on a death happening since the commencement of the act, takes a succession from the donee of the power, and is liable to duty.<sup>175</sup> So, under the federal succession tax act, a tax was imposed on the disposition of real estate, past or future, by deed, will or the laws of descent, whereby any

cessor" shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." See chapter 1, § 4.

<sup>171</sup> Layton, Leg. Duty (9th Ed.) 122.

<sup>172</sup> 26 Law J. Ch. 596.

<sup>173</sup> See, also, *Attorney General v. Lord Middleton*, 27 Law J. Exch. 229; *Attorney General v. Fitzjohn*, 2 Hurl. & N. 465; *Ring v. Jarman*, L. R. 14 Eq. 357; *Attorney General v. Gell*, 3 Hurl. & C. 615.

<sup>174</sup> *Attorney General v. Fitzjohn*, supra.

<sup>175</sup> *Attorney General v. Upton*, L. R. 1 Exch. 224.

person became beneficially entitled, in possession or expectancy, to real estate, or the income thereof, after June 30, 1864. It was held that, where the property was devised before the passage of the act to one for life, remainder to another, and the tenant for life died after the act went into effect, the tax accrued on the interest of the remainder-man at that time, for the reason that the succession or devolution took place on the death of the life tenant.\*

(d) *Under Pennsylvania Statutes.*

The recent statute of this state<sup>176</sup> embodies what seems to be a fair and just enactment regulating the imposition of the tax upon property passing to life tenants and remainder-men, and in respect to these estates the provisions of the statute are simple but comprehensive. The act applies to all estates made or intended to take effect in possession or enjoyment after the death of a decedent;<sup>177</sup> and where the taxable estate is devised to take effect in possession, or to come into actual enjoyment after the expiration of one or more life estates or a period of years, the tax shall not be payable or interest run thereon until the person liable shall come into actual possession of such estate by the termination of the estates for life or years. The tax is assessed at the time the right of possession accrues, provided that the owner shall have the right to pay the tax at any time prior to his coming into possession, and in such cases the tax shall

\* See *supra*, § 58, subd. b; *Wright v. Blakeslee*, 101 U. S. 174; *Clapp v. Mason*, 94 U. S. 589, 23 Int. Rev. Rec. 144; *Mason v. Sargent*, 104 U. S. 689; *Id.*, 23 Int. Rev. Rec. 155, Fed. Cas. No. 9,253; *Blake v. McCartney*, 4 Cliff. 101, 10 Int. Rev. Rec. 13, Fed. Cas. No. 1,498.

<sup>176</sup> Appendix, III., Laws 1887, p. 79, § 1. For Acts 1849, 1850, and 1855, see chapter 5, § 54, subd. c, p. 130, note, criticised in *Kintzing v. Hutchinson*, 34 Leg. Int. 365, Fed. Cas. No. 7,834. For statutes of Maryland and Connecticut, see Appendix, VII., VIII.

<sup>177</sup> Laws 1887, p. 79, § 3.

be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estate for years.

Before considering the subject of remainders, it may be well to state here that the liability to the tax under the statute is to be determined, not by the amount of the legacy, but by the amount of the whole estate. The exemption clause of the statute providing that "no estate which may be valued at a less sum than \$250 shall be subject to the duty or tax"<sup>178</sup> refers to the whole estate, and not to legacies, devises, or distributive shares carved therefrom.

Hence, where testator bequeathed seven legacies of \$200 each to seven charities, and the legacies amounted in the aggregate to an estate exceeding \$250, each of the legacies was held chargeable with the tax.<sup>179</sup> The same rule is now applied under the New York act of 1892.<sup>180</sup>

The statute requires the owner of any personal estate liable to the tax to file a bond for its payment and in case of failure so to do makes the tax immediately payable and collectible.<sup>181</sup>

The liability of remainder-men under the statutes of

<sup>178</sup> Act May 6, 1887, Appendix, III.

<sup>179</sup> *In re Howell's Estate* (1892) 147 Pa. St. 164, 23 Atl. 403; *In re Mixter's Estate* (1891) 10 Pa. Co. Ct. R. 409, overruling *Com. v. Kerchner*, 6 Pa. Law Rev. 308; *In re Evans' Estate* (1891) 8 Pa. Law. Rev. 321. See elaborate notes on this subject by S. H. Thomas, Esq., 10 Pa. Co. Ct. R. 409, and by C. B. Penrose, Esq., 49 Leg. Int. 26.

<sup>180</sup> *In re Hoffman's Estate*, 143 N. Y. 334, 38 N. E. 311; *In re Hall* (Sup.) 34 N. Y. Supp. 616; chapter 3, § 41.

<sup>181</sup> As to the extent to which this statute repeals or modifies the former law of Pennsylvania, it has been held that the act does not make any other or different estates liable, and that it is a codification of the prior law and decisions. See *In re Del Busto's Estate*, 23 Wkly. Notes Cas. 111, where all the statutes are carefully collated and explained by Penrose, J.; *In re Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 435, 17 Atl. 1094, affirming *Cooper v. Com.*, 5 Pa. Co. Ct. R. 271; *In re Bitteringer's Estate* (Appeal of Common-

Pennsylvania, which have already been, to some extent, necessarily considered in the previous chapter on appraisement, may be stated as follows:<sup>182</sup>

(1) Under the early statutes in force prior to 1850 the tax and interest thereon accrued and became payable immediately upon the decease of the person whose estate, passing to collateral heirs or strangers, was subject thereto, whether the estate passed in actual enjoyment directly, or remotely upon the termination of an intervening life estate or term of years, subject, however, to a deduction of the value of the outstanding life or other estate.<sup>183</sup>

wealth) 129 Pa. St. 338, 18 Atl. 132. As to constitutionality of act of 1887, see chapter 2, §§ 15, 29, and cases *supra*.

<sup>182</sup> For acts of 1849, 1850, and 1855 see chapter 5, § 54, subd. c, note 149, and 1 *Purd. Dig.* 215, 216. The act of April 7, 1826 (section 1), provided that all estates, real, personal, and mixed, of every kind whatever, passing from any person who may die seised or possessed of such estate, being within this commonwealth, either by will or under intestate laws thereof, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain, or sale made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons or body politic or corporate, in trust or otherwise, for the use of father, mother, husband, wife, children, and lineal descendants born in lawful wedlock, shall be and they are hereby made subject to a tax or duty of \$2.50 of the clear value of such estate or estates, and at and after the same rate for any less amount, to be paid to the use of the commonwealth; and all executors and administrators and their sureties shall only be discharged from their liability for the amount of any and all such duties on estates, the settlement of which they may be charged with by having paid the same over for the use aforesaid, as herein directed.

<sup>183</sup> *Com. v. Smith*, 20 Pa. St. 100, 105; *Mellon's Appeal*, 114 Pa. St. 564, 570, 8 Atl. 183; *In re Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094; *Fagely's Estate*, 128 Pa. St. 603, 18 Atl. 386; *Willing's Estate*, 33 *Leg. Int.* 54, 2 *Wkly. Notes Cas.* 308; *Del Busto's Estate*, 23 *Wkly. Notes Cas.* 111; *James' Appeal*, 2 *Del. Co. Rep.* 164; *Cullen's Estate*, 26 *Wkly. Notes Cas.* 216.



The same rule prevailed in North Carolina.<sup>184</sup> The words "all estates of every kind whatsoever" were held sufficiently comprehensive to include a remainder.<sup>185</sup>

Under this rule, where the testator devised his land to his sister for life, the proceeds at her death to be divided between brothers and sisters then living, and not to the heirs of such as were dead, it was held that under the act of 1826 the whole estate was taxable immediately after the testator's death, and was then collectible from his executors.<sup>186</sup>

(2) But, as we have already seen,<sup>187</sup> this condition of the law, by which a tax was imposed upon estates in remainder immediately upon the decedent's death, and where the estate might never vest in possession, and its value to the remainder-man was often problematical, was felt to be unjust.<sup>188</sup>

(3) To remedy this, two statutes were passed, one in 1850 and the other in 1855,<sup>189</sup> by the former of which, in case of a remainder or reversionary interest after an estate for life or years, the person entitled in remainder might elect to await the actual coming into possession of his estate before paying the tax; and in such case he was to give security to the register for its payment.<sup>190</sup> By act of 1855 it was provided that the penalty for nonpayment of the tax should not be charged in any case against the party entitled in remainder or reversion until his interest should come into actual possession and enjoyment, and "that, if such legatee

<sup>184</sup> *Attorney General v. Pierce* (1861) 6 Jones, Eq. 241.

<sup>185</sup> *Com. v. Smith*, 20 Pa. St. 103; *James' Appeal*, 2 Del. Co. Rep. 164.

<sup>186</sup> *Com. v. Eckert*, *supra*.

<sup>187</sup> Chapter 5, § 54, subds. c, 2.

<sup>188</sup> See *Mellon's Appeal*, 114 Pa. St. 570, 571, 8 Atl. 183; *Cooper's Estate*, 127 Pa. St. 435, 17 Atl. 1094.

<sup>189</sup> Chapter 5, § 54, subds. c, 2.

<sup>190</sup> *Id*.

or devisee shall elect to pay such tax in anticipation of the same coming into actual possession and enjoyment, the same shall be received at the then valuation of the legacy or devise, deducting the value of the life estate or term of years."

While these statutes empowered the remainder-man or his trustee, in their discretion, to postpone payment of the tax upon complying with certain conditions<sup>191</sup> as regards the filing of a bond and an inventory within a year after decedent's death, the right to an appraisement of such estates by the register immediately upon the death of the decedent was not taken away<sup>192</sup> until the act of 1887 came into effect, by which it is now plainly provided that the tax shall be assessed at the time the right of possession accrues. In this respect the ruling in *Mellon's Appeal*<sup>193</sup> seems to have been modified by express legislative sanction, and the construction previously placed upon the act of 1855 by several cases in the lower courts<sup>194</sup> was adopted. Hence, not only the payment of the tax upon estates in remainder, but the appraisement thereof, are now postponed until the estate vests in actual possession or enjoyment.<sup>195</sup> Both proceedings are, therefore, made to take place contemporaneously. Where, however, the life estate is not ended, the tax on remainder is not demandable, but an assessment should be made.<sup>196</sup>

Two instances, at least, however, exist in which the commonwealth would seem to have the right to an immediate

<sup>191</sup> See *Wharton's Estate*, 10 W. N. C. 105; *Willing's Estate*, *supra*; *Cooper's Estate*, *supra*.

<sup>192</sup> *Mellon's Appeal*, 114 Pa. St. 465, 8 Atl. 183; *James' Appeal*, 2 Del. Co. Rep. 164. *Contra*, *McGeary's Estate*, 14 Pa. Law J. (N. S.) 174; *Wharton's Estate*, *supra*. Chapter 5, § 54, subd. c.

<sup>193</sup> 114 Pa. St. 570, 571, 8 Atl. 183.

<sup>194</sup> *McGeary's Estate*, *supra*.

<sup>195</sup> See *Cooper's Estate*, 127 Pa. St. 425, 17 Atl. 1091.

<sup>196</sup> *Budd's Estate* (1892) 12 Pa. Co. Ct. R. 476.

payment of the tax: First, where the remainder-man desires to anticipate payment, or to elect to pay the tax before his estate vests in possession or enjoyment, in which event the statute provides that the tax shall be imposed upon the value of his remainder at the time of payment, deducting the value of the preceding estate;<sup>197</sup> second, where the remainder-man omits or neglects, within a year from the testator's death, to file the bond and inventory required by the statute in order to postpone payment of the tax. Such neglect showing a failure on his part to avail himself of the statutory right of election, under the terms of the law the tax becomes immediately payable and collectible.<sup>198</sup> We have already discussed the method or rule of appraisal under this provision,<sup>199</sup> but no authority seems to exist construing this clause of the statute.

The most recent construction of the law with reference to the liability of estates in remainder and the rights of remainder-men was made by the supreme court in *Re Cooper's Estate*,<sup>200</sup> where in construing the early statutes in connection with the act of 1887, the court said:

"Thus, the payment of the tax by remainder-men, which before this act<sup>201</sup> was payable at the death of decedent, may now, at their election, be postponed until they come into the actual possession, upon proper security for its payment. \* \* \* In estates liable to the collateral tax, the commonwealth is entitled to a tax on the entire estate. That when the tenant for life or years—being parent or

<sup>197</sup> *Cooper's Estate*, supra; page 138, c. 5, § 54.

<sup>198</sup> Appendix, III. § 3.

<sup>199</sup> Page 136, c. 5, § 54, subd. c.

<sup>200</sup> 127 Pa. St. 435, 439, 17 Atl. 1094 (1889). See, also, *Appeal of Mellon* (1886) 114 Pa. St. 572, 8 Atl. 183; *In re Willing's Estate*, 2 Wkly. Notes Cas. 307; *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174.

<sup>201</sup> P. L. 1850, p. 170.

lineal descendant, etc.—is exempt from liability, the whole tax on the entire estate must be paid by tenant in remainder. That in such cases the time of payment is postponed until the estate comes into actual possession of the tenant liable. That nevertheless, if such tenant elect, in anticipation, to pay at the death of the decedent, the tax is assessable on the then valuation of the entire estate, less the value of the estate for life or years,—that is, when the tenant of the intermediary estate is not liable,—the tenant in remainder has the election either to pay the tax on the entire estate, with interest, when he comes into actual possession, or to pay at the death of the decedent on the then valuation of the estate in remainder; and, in consideration of such anticipated payment, her right to the tax on the intermediate estate is waived by the commonwealth.”

It was further held that no substantial change in these respects was made by the act of 1887, and that if, under that act, tenant in remainder desires to pay the tax at any time prior to his coming into possession, it is to be assessed on the value of the estate at the time of payment of the tax, after deducting the value of the preceding estate; and that the value of the estate of the remainder-man depends upon the clear value of the estate that passes from the person who died seised, and the probable duration of the preceding life estate.<sup>202</sup> So that, under the recent statute and rulings, the only responsibility which tenant in remainder now assumes upon the death of his testator is, if he would postpone payment, either to give the bond and accompanying inventory for the payment of the tax when the estate vests in possession, or pay the tax immediately in anticipation. The year given to the remainder-man in which to do either one of these acts affords him ample time to exercise his judgment with respect to the condition of the estate.

<sup>202</sup> In re Cooper's Estate (Appeal of Commonwealth), *supra*.

Under the acts existing prior to 1887, it was held that for certain purposes—such as the statute of limitations, interest, and penalty—the tax accrued upon the devolution of the estate that was subject thereto, to wit, at decedent's death.<sup>203</sup> And this rule was applied both to estates in possession or expectancy. Under the act of 1887, it would seem, so far as estates in remainder are concerned, the tax only accrues when the remainder-man becomes vested with the possession of his estate, and no interest charges now attach until the estate so vests in possession by the termination of the preceding estate. The intent of the statute is that the tax accrues at decedent's death, unless enjoyment is postponed by a life estate in another, and, except in the case of such postponed adjournment, the value at the time of testator's death is the basis for calculating the amount of the tax.<sup>204</sup>

As has already been shown,<sup>205</sup> it would seem to be to the interest of the remainder-man, as a general rule, to anticipate payment of the tax upon his estate before it comes into possession, because, as the value of the outstanding life estate is to be deducted, the residue, being the interest of the remainder-man, is alone taxable. If, however, the remainder-man waits until his estate vests in possession, he must pay tax upon the full value of the estate coming to him upon the death of the life tenant. Thus, a testator leaves an estate which we will assume is worth \$5,000. Supposing the life tenant's interest to be \$2,000, and the remainder-man's interest at the testator's death \$3,000. By paying the tax immediately, the remainder-man pays upon the latter amount, but by waiting until the death of the life tenant the remainder-man pays upon the net value of

<sup>203</sup> Appeal of Mellon, 114 Pa. St. 572, 8 Atl. 183. But see *In re Cooper's Estate* (Appeal of Commonwealth), *supra*.

<sup>204</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.

<sup>205</sup> Chapter 5, § 54, note.

the whole estate coming to him at the time the right of possession accrues, i. e. at the death of the life tenant, and thus upon the full amount of \$5,000; assuming, of course, that the value of the interest in remainder has not at that time considerably depreciated.

The tax is imposed, not upon the identical property passing to the remainder-man, but upon its net value; that is, upon the sum representing the interest of his estate, after deducting all lawful debts and obligations against the estate of the testator.<sup>206</sup>

The tax is imposed only on what remains for distribution after all the expense of administration debts and rightful claims of third parties, domestic as well as foreign, have been paid or provided for. It is only the net balance that is liable.<sup>207</sup> This does not include the expense of counsel in litigation among persons claiming as distributees of the decedent's estate.<sup>208</sup> The income derived from the estate of a decedent during the first year after his death is not subject to tax, although by direction of decedent's will, added to the principal, and both principal and income applied indiscriminately to the payment of expenses, etc. The tax fastens upon so much of the estate as passes to collaterals as it stands at the death of the testator. It comes out of the corpus of the gift upon its descent or transmission, upon the death of the former owner, to the beneficiary. Income accruing subsequently comes not from the testator or intestate, but from the property held by or for the use of the legatee or other beneficiary.<sup>209</sup>

<sup>206</sup> *In re Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 440, 17 Atl. 1094; *In re Fagely's Estate* (Appeal of Commonwealth) 128 Pa. St. 613, 18 Atl. 386; *In re Lines' Estate*, 155 Pa. St. 379, 26 Atl. 728; and cases cited chapter 5, § 52; c. 4, § 49.

<sup>207</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728; *In re Coleman's Estate* (1893) 159 Pa. St. 231, 28 Atl. 137.

<sup>208</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.

<sup>209</sup> *In re Williamson's Estate* (1893) 153 Pa. St. 508, 26 Atl. 246, re-  
(324)

When the act of 1887 declares that the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner, or that the tax shall be assessed on the value of the estate at the time of the payment of the tax, it refers to the then quantum of the estate after deducting the life estate, and not to the value of the land, which may be a very different estate from that which passed from the decedent.<sup>210</sup>

Where payment of the tax is made after the possession accrues, the remainder is to be valued as of the date of possession.<sup>211</sup> And this is so whether the remainder arises by formal bequest or by operation of law.<sup>212</sup>

Where decedent devised his estate to his niece for life, with remainder in fee to her son, and the latter died before his mother, leaving as heirs his sisters, held, upon the death of his mother, that, as the son never had the actual enjoyment or possession of the estate, it was not taxable as passing from him to his sisters, but that the devise to him from the original decedent was taxable at the rate imposed by statute at the time of the latter's death, and not at the rate imposed by the law in existence when the mother died.<sup>213</sup>

(4) Where the life tenant has power to dispose of the corpus of the estate during life, and not simply the use of the income, and there is a bequest to collateral heirs of any surplus that shall or may remain after such life tenant's death, no tax can be imposed upon the residue of the estate until the termination of the life estate, as it is impossible

versing 49 Leg. Int. 106, 30 Wkly. Notes Cas. 134, 11 Pa. Co. Ct. R. 235, and 1 Pa. Dist. R. 159.

<sup>210</sup> *In re Cooper's Estate* (Appeal of Commonwealth) 127 Pa. St. 435, 17 Atl. 1094.

<sup>211</sup> *Appeal of Commonwealth*, *supra*; *Appeal of Mellon*, *supra*.

<sup>212</sup> *In re McGeary's Estate*, 14 Pa. Law J. (N. S.) 174.

<sup>213</sup> *James' Appeal*, 2 Del. Co. Rep. 164. See *In re Cullen's Estate*, 26 Wkly. Notes Cas. 216.

to ascertain the value until that time.<sup>214</sup> The same result has been reached under the New York statute.<sup>215</sup>

Where, however, the will gives the life tenant—a widow—an estate upon the express condition that she pay certain legacies to collateral relatives, the gifts to the legatees are direct and vested, and subject to the tax.<sup>216</sup>

And where<sup>217</sup> the testator bequeathed his residuary estate to his wife, in trust, to be given by her, or as she might direct, by will or otherwise, for charitable purposes, with the proviso that in case of her death before she should have used the estate for her support the surplus should be paid by her executors to specific charities, it was held that the wife did not take the whole residuary estate; that the amount necessary for her support was capable of ascertainment; and that a valid trust was created in the residue, which, after deducting the amount of such support, was liable to taxation. "There can be no doubt," said the court, "but that, if it had been required, the whole estate might have been taken by Mrs. B. for her support; but that is a fact which, under the authorities, may be ascertained by competent evidence."<sup>218</sup>

(e) *Massachusetts Statute.*

Under this act,<sup>219</sup> where property is bequeathed to a direct heir for life or for a term of years, and the remainder to a

<sup>214</sup> *In re Nieman's Estate*, 131 Pa. St. 346, 18 Atl. 900. See *Mellon's Appeal*, supra.

<sup>215</sup> *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866. See cases discussed in chapter 5, § 54, subds. d, b, and supra, § 58, subd. c.

<sup>216</sup> *In re Nieman's Estate*, supra.

<sup>217</sup> *In re Brewer's Estate*, 15 P. L. J. (N. S.) 433; 16 Pa. Law J. (N. S.) 114.

<sup>218</sup> Citing *In re Redroth's Will*, 27 Beav. 583; *Ensinaw v. Directors of Poor*, 47 Pa. St. 509; *Reck's Appeal*, 78 Pa. St. 432; *Fisk v. Attorney General*, L. R. 4 Eq. 521; *Witman v. Lex*, 17 Serg. & R. 93.

<sup>219</sup> *Laws Mass.* 1891, c. 425, § 2.



collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised, and deducted from the appraised value of the property. The remainder shall be subject to a specified tax, and the tax shall be computed and deducted from the principal sum, and paid over to the treasurer of the commonwealth <sup>220</sup> "at the expiration of two years from the date" of the executor's bond, or when the legacy is paid, if paid within two years; and the amount of the loss of the income of the tenant for life or years caused by the diminution of the principal of the fund is not to be made up to him out of the principal or out of the general funds of the estate.<sup>221</sup>

### § 59. Fraudulent Transfers, Trusts, and Gifts Inter Vivos and Causa Mortis.

#### (a) *Statutory Provisions.*

The legacy and succession tax laws of England <sup>222</sup> and the collateral and direct inheritance tax laws of most of the states are, for obvious reasons, framed so as to include not only property passing by will or intestacy, but generally all property which shall be transferred by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment at or after the death of the grantor, transferror, or bargainor, to any person other than those specially exempted. Such is the provision of the statute of New York of 1887.<sup>223</sup>

The statute of 1892 <sup>224</sup> provides for a tax when the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within the state, by

<sup>220</sup> Under Laws, 1891, c. 425, § 4.

<sup>221</sup> *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512. But see *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106.

<sup>222</sup> 16 & 17 Vict. c. 51, §§ 7, 8.

<sup>223</sup> Appendix, I. a, § 1.

<sup>224</sup> Appendix, I. e, c. 399, § 1, subd. 3.

deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or income thereof by any such transfer, whether made before or after the passage of the act.

The statute<sup>225</sup> further provides that the words "estate" and "property" shall be taken to mean the property of the testator, etc., and not that of the legatee or devisee, etc., and shall include all property or interest therein, whether situated within or without the state, over which the state has any jurisdiction for the purposes of taxation. It also provides that the word "transfer" shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale, or gift, in the manner prescribed in the act. Similar enactments are contained in the laws of other states.<sup>226</sup> In North Carolina it was also made a misdemeanor to make any fraudulent or intentional disposition of property *inter vivos* for the purpose of evading the tax,<sup>227</sup> a provision which does not seem to be contained in any of the other statutes. While the law of New York upon the subject of gifts and conveyances *inter vivos* and *causa mortis* made or intended to take effect, in possession or enjoyment, at or after death, has not been the subject of judicial interpretation by the highest courts, the question has been considered in many instances, in the lower courts; and in Pennsylvania, from whose statutes the language of the New York statutes has been substantially copied,<sup>228</sup> the

<sup>225</sup> Appendix, I. e, § 22.

<sup>226</sup> See statutes, Appendix.

<sup>227</sup> Rev. Code, 1855, c. 99, §§ 7, 8.

<sup>228</sup> See *In re Johnson's Estate* (Surr.) 19 N. Y. Supp. 963.

meaning and effect of similar provisions have been frequently under consideration. The general rule established by these authorities is that the tax is payable on all property transferred by deed, grant, etc., to collateral or lineal heirs or strangers made or intended to take effect in possession or enjoyment at, on, or after, the death of the grantor, or transferror, the policy of the law being not to permit the owner of an estate to evade or defeat the tax by any device which secures to him for life the income, profit, or enjoyment of an estate where, after death, the corpus of the estate or only part thereof shall inure to the benefit of persons who are not exempted. Hence, it would seem that payment of the tax can only be defeated or avoided by such a bona fide conveyance as parts absolutely with the possession, title, and enjoyment in the grantor's lifetime. These general principles and others have been enunciated and are sustained by the authorities under this clause of the statute.<sup>229</sup>

So the acts of congress required that a transfer, in order to avoid the tax, should be made "upon valuable and adequate consideration,"<sup>230</sup> which phrase was construed to mean either money paid or some present legal interest or estate parted with or charged, or services rendered to the value of the property received,<sup>231</sup> and under the English law

<sup>229</sup> *Reish v. Com.*, 42 Leg. Int. 102, affirmed 106 Pa. St. 521; *Seibert's Appeal*, 110 Pa. St. 329, 1 Atl. 346; *Du Bois' Appeal*, 121 Pa. St. 368, 15 Atl. 641; *Davenport's Appeal*, 3 Pa. Sup. Ct. Dig. 236; *Trutt v. Crotzer*, 13 Pa. St. 451; *Wright's Appeal*, 38 Pa. St. 507; *In re Thomson's Estate*, 5 Wkly. Notes Cas. 19; *Waugh's Appeal*, 78 Pa. St. 436; *In re Conwell's Estate*, 45 Leg. Int. 266; *In re Riddle's Estate*, Id. 394; *Com. v. Kuhn*, 2 Pa. Co. Ct. R. 248; *U. S. v. Banks*, 17 Fed. 322; *U. S. v. Hart*, 4 Fed. 293. See, also, *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728. See *In re Brewer's Estate*, 15 Pittsb. Leg. J. 433; 16 Pittsb. Leg. J. 114; *Attorney General v. Montifiore*, 59 Law T. 534; *In re Higgins*, 45 Law T. (N. S.) 199; *In re Micklewait*, 11 Exch. 452. See, also, *In re Johnson's Estate* (Surr.) 19 N. Y. Supp. 963.

<sup>230</sup> *U. S. v. Banks*, *supra*.

<sup>231</sup> *U. S. v. Hart*, *supra*.

a conveyance or assignment by way of bona fide sale did not create a succession upon which the duty could be imposed.<sup>232</sup> But, under the recent English "Estate Duty Act" of 1894, the following classes of property are liable to be included in an account for the purpose of estate duty: (1) *Donatio mortis causa*; (2) gifts made by a disposition *inter vivos* within 12 months before death; (3) gifts, made at any time, where the donor retains any interest; (4) property which the deceased caused to be vested in himself and some other person, so that on his death it passes to the survivor; (5) property settled by the deceased otherwise than by will, in which he retains a life interest, or has a power of revocation.\*

The fact, however, that the transfer or conveyance was actually made by the owner to defeat the tax will not invalidate the transfer, but the fund will be liable to taxation in the hands of the *cestui que trust*,<sup>233</sup> and it is not essential under the language of these acts that such gifts or conveyances should be intentional or fraudulent, the language generally being "made or intended." The fact, therefore, that they are made for the purpose of avoiding the tax, or that such purpose is accomplished by the transfer, would seem to be sufficient in law.<sup>234</sup>

Thus it would seem that the language of these statutes is broad enough to include, and is intended effectually to cover, even the most intricate transfers of property the object of which is to avoid payment of the tax, or is intended so to do. It is payable, therefore, where the conveyance is

<sup>232</sup> *Fryer v. Morehouse*, 3 Ch. Div. 675. As to what constitutes a disposition of property within the English succession act, see *Attorney General v. Montifiore*, *supra*; *In re Micklewait*, *supra*; *In re Higgins*, *supra*.

\* Finance Act 1894 (57 & 58 Vict. c. 30), § 2. See "Estate Duty and Succession Duty," by J. E. C. Munro (London, 1894) p. 6.

<sup>233</sup> *Trutt v. Crotzer*, 13 Pa. St. 451.

<sup>234</sup> *In re Conwell's Estate*, 45 Leg. Int. 266.

such as to clothe the grantee with the mere naked legal title, liable to be defeated at any time by the grantor or in the event of the grantee's death before the grantor;<sup>235</sup> and the rule was applied where the deed was not delivered until after the death of the grantor;<sup>236</sup> and a deed is within the statute which was made by one (who died intestate) to trustees to convey and assign the property after the grantor's death in accordance with his will, or, in case of intestacy, to those who, had the deed not been made, would have been entitled under the intestate laws to inherit.<sup>237</sup>

So any assignment in trust reserving to the grantor the income for life, and directing the corpus to be conveyed to collateral heirs after the grantor's death, is within the statute; as, for instance, a transfer of shares by testatrix in her lifetime to legatees, reserving to herself the dividends and income for her support,<sup>238</sup> or an assignment to trustees to pay the assignor the income for life, and after his death to pay certain sums to persons named in the deed, if they survived him, with the right of revocation, which was not exercised.<sup>239</sup>

So a deed of trust directing that the devisees or trustee shall hold such securities and property in trust for the uses and purposes set forth in a will or deed executed previously, whereby the entire estate was bequeathed to collateral relatives, and charity will not relieve the estate from liability.<sup>240</sup>

<sup>235</sup> Appeal of Du Bois, 121 Pa. St. 368, 15 Atl. 641; In re Lines' Estate (1893) 155 Pa. St. 378, 26 Atl. 728.

<sup>236</sup> Davenport's Appeal (Pa. Sup.) 14 Atl. 346, 3 Pa. Sup. Ct. Dig. 236.

<sup>237</sup> Com. v. Kuhn, 2 Pa. Co. Ct. R. 248.

<sup>238</sup> In re Riddle's Estate, 45 Leg. Int. 394. Contra, In re Hendricks (Surr.) 3 N. Y. Supp. 281; U. S. v. Leverich, 9 Fed. 586.

<sup>239</sup> Wright's Appeal, 38 Pa. St. 507; In re Thomson's Estate, 5 Wkly. Notes Cas. 19.

<sup>240</sup> Seibert's Appeal, 110 Pa. St. 329, 1 Atl. 326; In re Lines' Estate (1893) 155 Pa. St. 378, 26 Atl. 728.

Where decedent executed a deed purporting to convey his entire estate to a trustee to pay income to him, grantor, for life, and upon his death to distribute the principal among strangers and collaterals, the estate passing under such deed is subject to the tax.<sup>241</sup>

The right of the commonwealth to tax is not defeated by a conveyance or transfer of title to the property during the lifetime of the owner, nor by possession taken under such conveyance, if the enjoyment of the property conveyed is not intended to take effect until the death of the grantor.

Decedent, in his lifetime, executed a deed of trust conveying to a trust company in New York certain bonds of a Missouri corporation and stock of a New Jersey corporation. The trustee was to collect the interest and dividends and pay them over to decedent during his life, and upon his death to certain beneficiaries named. The trust deed reserved to the decedent the power "to alter, change, modify, or revoke all disposition and direction as to transfer and dispositions made and to be made of said property" after his decease. Decedent was a citizen of Pennsylvania, domiciled in that state, both at the time the deed was executed and at his death. He made no change in the beneficiaries mentioned in the deed. Some of the beneficiaries were citizens of Pennsylvania and some of another state. None were residents of New York at the date of the execution of the deed, nor at the death of decedent. No debts were owing by decedent in New York; no ancillary administration was taken there, and no succession tax had been paid in that state. Held that the beneficiaries named in the deed were liable for the tax.<sup>242</sup> Sterrett, C. J.: "In view of the undisputed facts, it is strange that any question should have been seriously raised, either as to the right of the common-

<sup>241</sup> *In re Maris' Estate* (1893) 50 Leg. Int. 458, 14 Pa. Co. Ct. Rep. 171, and 3 Pa. Dist. R. 33.

<sup>242</sup> *In re Lines' Estate* (1893) 155 Pa. St. 378, 26 Atl. 728.

wealth to the tax on the securities, or the liability of the beneficiaries to pay their respective proportions thereof. Mr. Lines was not only the beneficial owner of the securities prior to and at the time of his decease, but under the reserved power of modification, revocation, etc., he had absolute control of the disposition to be made of the securities upon his decease. At any time prior thereto he could have modified or revoked the trust in favor of the beneficiaries named in the deed. It is true, the legal title to the securities was in the trust company, but, aside from compensation for its services as custodian of the property, the company had no beneficial interest therein. In any proper sense of the term, the securities were the personal property of Mr. Lines. They were his to enjoy during his lifetime, and his to dispose of in any manner he saw fit, at any time prior to his decease. He chose to leave the trust in favor of the beneficiaries unaltered and unrevoked, and, as he intended, it took effect, in enjoyment, immediately after his decease. Moreover, the securities were that kind of personal property the situs of which follows the owner.”<sup>243</sup> The manifest purpose of our collateral inheritance tax is to subject property limited by deed in the manner stated in the statute to taxation, because it is still substantially the property of the grantor, and does not actually pass, nor is it intended to pass, to the beneficiaries until his death, and hence it is essentially similar in that respect to a devolution of property by testacy or intestacy upon the death of the owner.<sup>244</sup>

And where two sons, A. and B., took an estate in fee under their father's will, and a release was made from A. to B., releasing B. from all claims under his father's will on

<sup>243</sup> Citing *Orcutt's Appeal*, 97 Pa. St. 179.

<sup>244</sup> Citing *Reish v. Com.*, 106 Pa. St. 521; *Appeal of Seibert*, 110 Pa. St. 329, 1 Atl. 346; *In re Du Bois' Appeal*, 121 Pa. St. 386, 15 Atl. 641.

condition that B. should convey all the lands to A.'s children, they to take possession at A.'s death, and to give him an obligation payable after his death, and A., having consummated the arrangement, died single, and without issue, his share was held liable.<sup>245</sup>

And a transfer by A., unmarried, and without lineal heirs, of all his property in fee to B., his brother, the latter giving A. a bond conditioned that A. should have the property to enjoy during A.'s life, on A.'s death a few days after, was held within the statute.<sup>246</sup>

Again, where testator had bequeathed his estate to a religious corporation, and long prior to his death had advanced to the beneficiaries, on account of their legacy, large sums, and took from them their bond conditioned for the payment during his life of an annuity equal to interest at 6 per cent. on the advancement, the moneys so advanced were held to be a contrivance to defeat the tax, and liable.<sup>247</sup>

And a deed of gift to a son, though made as an advancement, and as such chargeable against the son's share of the father's estate, is a succession under the act of congress,<sup>248</sup> as a conveyance made without valuable and adequate consideration.<sup>249</sup>

Where A. bequeathed property to B. and C., and on making her will wrote to them that she intended the bequest to be applied to a charitable purpose, and relied on their honor to fulfill her wishes, and they accepted the trust in her lifetime, held that, the will itself not showing a charitable purpose, the legacy was liable to duty.<sup>250</sup>

But, as we have seen, whenever the absolute title passes

<sup>245</sup> *Waugh's Appeal*, 78 Pa. St. 436.

<sup>246</sup> *Reish v. Com.*, 106 Pa. St. 521, affirming 42 Leg. Int. 102.

<sup>247</sup> *Conwell's Estate*, 45 Leg. Int. 266.

<sup>248</sup> June 30, 1864, § 132.

<sup>249</sup> *U. S. v. Banks*, 17 Fed. 322; *U. S. v. Hart*, 4 Fed. 293.

<sup>250</sup> *Cullen v. Attorney General*, L. R. 1 H. L. 190.



from the grantor to the grantee in the lifetime of the former, the tax is not imposed, as where the grantor, at the request of the grantee, through a third person, delivers the deed to the latter for the grantee, even though it never comes to the latter's possession until the grantor's death. And it would seem to make no difference that the latter devises the same property by will to the grantee as he takes under the deed.<sup>251</sup>

And where defendant's mother took a vested interest in a trust fund created by defendant's brother, the enjoyment of which in possession only was postponed until the death of defendant's said brother with a power of disposition by will, and prior to the creation of the trust the mother had made her will in favor of the defendant and her brother, and the latter died before the mother, held that, as the trust deed gave a vested remainder to the mother, the defendant took under the latter's will, and not from the brother, and that the fund was not liable to the tax.<sup>252</sup> Where, by the terms of the deed, a part of the consideration of a voluntary conveyance of land taking effect presently, was the maintenance by the donee of the donor for life, and the same is not charged on the real estate, the land is not chargeable with the tax.<sup>253</sup> Where there has been in good faith a parol gift of land, and continued possession and enjoyment by the donees until the donor's death, the state cannot, in proceedings to enforce the tax, take advantage of the statute of frauds.<sup>254</sup>

A promissory note of uncertain value, transferred by decedent in his lifetime to another, who took the risk of col-

<sup>251</sup> *Stinger v. Com.*, 26 Pa. St. 422. See *Du Bois' Appeal*, 121, Pa. St. 368, 15 Atl. 641.

<sup>252</sup> *Hackett v. Com.*, 102 Pa. St. 506.

<sup>253</sup> *In re McCormick's Estate* (1894) 3 Pa. Dist. R. 838, 25 Pittsb. Leg. J. (N. S.) 91.

<sup>254</sup> *In re Huey's Estate* (1894) 24 Pittsb. Leg. J. (N. S.) 470.

lection in consideration of an annual sum to be paid to decedent as long as he should live, is not within the statute.<sup>255</sup>

In England, under the legacy act, property passing under trust deed, even with power of revocation, was not liable,<sup>256</sup> and so as to gifts inter vivos,<sup>257</sup> real estate of decedent situate in another state, held in trust for his nieces, is not within the statute.<sup>258</sup> But the law in these respects is now modified by statute, and real and personal property passing by deed of trust or by gifts inter vivos or donatio mortis causa to take effect at death are liable to succession duty.<sup>259</sup>

The provisions of the New York statutes with reference to the taxation of interests passing by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment at or after such death, have already been referred to at length.<sup>260</sup>

Where the testatrix, by will, bequeathed all her property to her executor individually, but agreed with him, at the time of the making of the will, that the bequest should be in trust for her brother, such trust is within the exemption of the statute.<sup>261</sup>

A bequest absolute in form to executors, pursuant to an understanding between them and testator, by which a valid parol trust was created in favor of certain charitable cor-

<sup>255</sup> *In re Garman's Estate*, 3 Pa. Co. Ct. R. 550. But see *In re Biddle's Estate*, 45 Leg. Int. 394.

<sup>256</sup> *Tompson v. Browne*, 3 Mylne & K. 32.

<sup>257</sup> *Brown v. Advocate General*, 1 Macq. H. L. Cas. 79.

<sup>258</sup> *In re Dewey's Estate*, N. Y. Law J. Oct. 21, 1889.

<sup>259</sup> Layton, Leg. Duty (9th Ed.; 1892) pp. 26-110 et seq.; 16 & 17 Vict. c. 51, §§ 1, 2, 8.

<sup>260</sup> *Supra*, p. 327. For the taxation of such interest under the retroactive clause act of 1892, see *supra*, section 58, subds. c, f.

<sup>261</sup> *In re Farley's Estate*, 15 N. Y. St. Rep. 727. *Contra*, *Cullen v. Attorney General*, L. R. 1 H. L. 190.

porations which were exempt from taxation, is not subject to the legacy tax.<sup>262</sup>

And where the property passed to trustees under a trust deed, and the net income thereof to the grantor for life, the trustees on her death to convert the property into money and distribute the same among collaterals, and the deed was irrevocable, held, that the corpus of the estate, having passed at the date of the deed, and in one instance before the act went into effect, was not within the law.<sup>263</sup> This is not thought to be a well-considered case, and its authority is doubtful in view of subsequent decisions by the same court and the language of the statute of 1892.

Decedent, by will made in 1882, and by codicil executed in 1889, gave his property in certain proportions to his wife and issue. Afterwards he executed a deed of trust by which he transferred the bulk of his property to a trustee in trust to invest the same and apply the income therefrom to the support and maintenance of the grantor and his family, and, upon the death of the grantor, to distribute and pay over the property and its proceeds to and among the heirs or representatives in accordance with the provisions of his will. The testator died in 1891. Held, that the property passed under the will, and not under the deed executed subsequently, and was liable to taxation.<sup>264</sup>

Ransom, S., said: "It will be seen that the Pennsylvania courts, in the cases cited above, while recognizing the fiction of law that the deed granting the power and the will exe-

<sup>262</sup> *In re Murphy's Estate* (1893) 4 Misc. Rep. 230, 25 N. Y. Supp. 107.

<sup>263</sup> *In re Hendricks' Estate* (Surr.) 3 N. Y. Supp. 281; *U. S. v. Leverich*, 9 Fed. 586. But see *In re Riddle's Estate*, 45 Leg. Int. 394; *In re Lovelace*, 4 De Gex & J. 340; *In re Johnson's Estate* (Surr.) 19 N. Y. Supp. 963; *In re Lines' Estate*, 155 Pa. St. 378, 26 Atl. 728.

<sup>264</sup> *In re Johnson's Estate* (Surr.) 19 N. Y. Supp. 963, citing *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91; *Reish v. Com.*, 106 Pa. St. 521; *Seibert's Appeal*, 110 Pa. St. 329, 1 Atl. 346.

cuted thereunder, are to be construed as one instrument, hold that the instrument is to be regarded as a deed to take effect in enjoyment upon the decedent's death. The statute of this state<sup>265</sup> corresponds in its language to the Pennsylvania act, and should receive a similar construction. The law when the deed goes into effect, viz. the death of the testator or donee of the power, should govern,<sup>266</sup> not the law at the time the deed was executed."

Under the act of 1892<sup>267</sup> transfers by deed are taxable only (1) when made in contemplation of the death of the transferor, or (2) are intended to take effect in enjoyment after the death of the transferor. Where the transfer was in the nature of a gift *inter vivos*, its taxation is not contemplated by the act.<sup>268</sup>

But a gift *causa mortis* by decedent to his debtor of a promissory note is, it seems, subject to the inheritance tax.<sup>269</sup>

So, where decedent made a gift *causa mortis* in writing, of a box and its contents, consisting of savings bank books, stating to the donee "that you will take charge of all my personal effects of every kind, and to have and to hold the same unto yourself, your heirs and assigns forever," and thereupon delivered to the donee his papers and books, the property was held liable to the inheritance tax. The court said: "This statute<sup>270</sup> evinces the intention of the legislature to subject to a tax all property which should be transferred by a gift to take effect after the death of the grantor

<sup>265</sup> Laws 1891, c. 215, amending Act 1887.

<sup>266</sup> *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281.

<sup>267</sup> Appendix, I., Laws 1892, c. 399.

<sup>268</sup> *In re David*, 13 N. Y. Law J. 479.

<sup>269</sup> *In re Crosby* (1891; *Surr.*) 20 N. Y. Supp. 62; *In re Edwards' Estate* (N. Y. App.) 41 N. E. 89, affirming 32 N. Y. Supp. 901 (*Sup.*). As to the taxation of *donatio mortis causa* under the English statutes, see Layton's *Legacy Duty* (9th Ed.) p. 26.

<sup>270</sup> Appendix, Act 1887, c. 713, § 1.

or bargainor. The title to the property passed to the appellant upon its delivery to him by the donor, but the gift was subject to revocation at all times during the lifetime of the giver, and in that sense it took effect in enjoyment after the death of the grantor. He could not have maintained an action for the recovery of the money represented by the bank books during the lifetime of Edwards, and therefore he could not enter upon the full enjoyment of the gift until after his death. The gift, therefore, seems to fall within the spirit and intention of the statute, and the tax was, therefore, properly imposed.”<sup>271</sup>

### § 60. Powers of Appointment.

Property devised to a daughter for life, with power of appointment by will in the life tenant, which property the daughter by will devised to her brothers and sisters and their children being lineal descendants of her father, is not liable to the tax;<sup>272</sup> but where the power is improperly exercised, and the estate descends as the estate of the donee to collaterals, the tax is payable on the descent from the donee to the appointee, notwithstanding the tax was paid in another state on the descent from the donor to the donee.<sup>273</sup>

In *Re Stewart*,<sup>274</sup> a trustee was given, under decedent's will, power of appointment among such legatees named in the will as he should select.<sup>275</sup> He executed the power four

<sup>271</sup> *Dykman, J., in Re Edwards' Estate* (Sup.) 32 N. Y. Supp. 901, affirmed, without opinion, in court of appeals, May 3, 1895 (41 N. E. 89).

<sup>272</sup> *Com. v. Williams*, 13 Pa. St. 29; *Com. v. Sharpless*, 2 Chest. Co. Rep. (Pa.) 246.

<sup>273</sup> *Com. v. Sharpless*, *supra*; *Com. v. Schumacher*, 9 Lanc. Co. Bar (Pa.) 199; *Hackett v. Com.*, 102 Pa. St. 505.

<sup>274</sup> 10 N. Y. Supp. 15 (Surr.), affirmed in 131 N. Y. 274, 30 N. E. 184.

<sup>275</sup> As to discretion of trustees under powers under the English

years after decedent's death. Among certain of the appointees were collateral heirs, and it was held that, although the property passing under the power could not be appraised or taxed at decedent's death, it became appraisable and taxable at the time the power was executed. Ransom, S., said: "It is a well-settled principle of the law that where parties take under a power of appointment they take under the instrument creating the power, so that the parties named by H. under the power given him must be regarded as the persons selected by Mrs. Stewart. It is true that their interest did not accrue until the date when the power was executed, \* \* \* at which date also the tax upon their interests accrued."<sup>277</sup> These views were affirmed in the court of appeals.<sup>278</sup> Where decedent died in 1859, giving his daughter a life interest in a trust fund, with power of appointment by will, and the daughter died in 1893, appointing the fund, it was held liable to taxation, under the retroactive clause of the act of 1892,<sup>279</sup> as against the beneficiaries taking under the power.<sup>280</sup> The surrogate said: "An estate or interest derived from the execution of a power of appointment is regarded as acquired under

statutes, see *Attorney General v. Simcox*, 1 Exch. 749; *Attorney General v. Holford*, 1 Price, 426; *Attorney General v. Mangles*, 5 Mees. & W. 120; *Advocate General v. Ramsay*, 2 Crompt., M. & R. 224. For cases generally upon the subject of powers under these statutes, see *Drake v. Attorney General*, 10 Clark & F. 257; *Attorney General v. Brackenbury*, 1 Hurl. & C. 782; *Platt v. Routh*, 6 Mees. & W. 756. And see 36 Geo. III. c. 52, § 18; *Attorney General v. Mumby*, 3 Hurl. & N. 826; *Attorney General v. Chapman*, [1891] 2 B. D. 522.

<sup>277</sup> See chapter 5, § 54, subds. d, c.

<sup>278</sup> 131 N. Y. 274, 30 N. E. 184, citing 4 Kent, Comm. 338; *Jackson v. Davenport*, 20 Johns. 537; 2 Sugd. Powers, p. 22.

<sup>279</sup> Chapter 399, § 1, subd. 3. See this clause and cases arising thereunder considered *supra*, section 58, subds. c, f.

<sup>280</sup> *In re Brooks' Estate*, per Fitzgerald, S., 32 N. Y. Supp. 176. See, also, *In re Tobias*, *supra*.

and by virtue of the instrument raising the power. Nevertheless, such estate or interest does not vest nor is it created until the time of appointment, although the source of its origin is found in the instrument conferring the power.<sup>281</sup> The circumstance that the appointee takes under such instrument as the source of his title, and not any notion that the estate or interest taken becomes vested or is created, either actually or constructively, at the time such instrument goes into effect, is the reason for regarding the estate or interest created by the power as passing by a transfer made by such instrument within the meaning of the acts for the taxation of decedents' estates.<sup>282</sup> An estate or interest originating in the manner described is, with respect to the time of its creation and vesting the same, in effect as if it were an estate acquired by direct and exclusive operation of the instrument creating it by a person who had come into being subsequently to the time when the instrument took effect. The devise of a remainder dependent upon a life estate and vesting in such person upon his birth, is an instance of the disposition last referred to. The estate or interest so acquired does not vest nor come into existence until, in one case, the power has been executed, and, in the other, until the beneficiary has come into being. A different result the doctrine of relation is incapable of producing, and it is properly confined in its application in such cases and for the purposes of the acts mentioned referring the estate or interest to the source, whether immediate or remote, from which the title is derived. In the present case the estate or interest which the beneficiary has taken under the power, as well as the right of possession thereof, came into existence after the passage of the act,<sup>283</sup>

<sup>281</sup> Citing *Jackson v. Davenport*, 20 Johns. 551, 552; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184.

<sup>282</sup> *In re Stewart*, *supra*.

<sup>283</sup> Laws 1892, c. 399, *supra*.

under consideration. Similarly the beneficiary as beneficiary had no previous existence. Such being the case, there is no doubt that the beneficiary is, with respect to the estate, which he has taken, a person who has become beneficially entitled in possession to property after the passage of the act of 1892, by a transfer previously made.”<sup>284</sup> Where the estate of a resident decedent included real estate and chattels in another state, and where, under a power of sale given by his will to his executors for the purpose of paying legacies and making distribution, said property was sold and converted into money, held that the real property without the state was not subject to appraisal and tax under the statute, but that the personalty was.<sup>285</sup>

Both the English legacy and succession duty acts impose taxes upon property passing under powers of appointment.<sup>286</sup> Under the succession duty act, the appointee under a general power of appointment which has taken effect on a death happening since the commencement of the act takes a succession from the donee of the power, and is liable to duty.<sup>287</sup>

It has been held, where property passed under an imperative special power, to the life tenant in trust, and the appointees being specified in the decedent's will, that a formal execution of the power by the life tenant in her lifetime was not necessary to vest in the appointees title to the property, and that notwithstanding one of the appointees, who was not taxable, might, if he should survive, inherit the whole property, the shares of the nonexempt

<sup>284</sup> See, also, *In re Johnson's Estate* (June 16, 1892; Surr.) 19 N. Y. Supp. 963.

<sup>285</sup> *In re Swift* (1893) 137 N. Y. 77, 32 N. E. 1096.

<sup>286</sup> 36 Geo. III. c. 52, § 18; 16 & 17 Vict. c. 51, § 4. See *Charlton v. Attorney General*, 4 App. Cas. 427; *Attorney General v. Brackenbury*, 1 Hurl. & C. 782; *Platt v. Routh*, 6 Mees. & W. 756.

<sup>287</sup> *Attorney General v. Upton*, L. R. 1 Exch. 224.



remainder-men were immediately taxable.<sup>288</sup> But under recent adjudications, however, no such tax can be so imposed until the estate vests in possession or enjoyment.<sup>289</sup>

### § 61. Legacies for Debts and Other Obligations.<sup>290</sup>

Decedents at times expressly provide for the payment of their debts by will, bequeathing to the creditor a specific amount in payment of his claim. In numerous instances legacies are also bequeathed "free" or "clear of" the tax, and in such cases the question frequently arises as to whether the decedent's estate is to pay the tax or the legatee out of the legacy.<sup>291</sup>

While a legacy is defined to be any estate or interest in property, either real, personal, or mixed passing by will,<sup>292</sup> the general rule is that a legacy in payment of a legal debt,

<sup>288</sup> *In re Hyde*, 7 N. Y. Law J. 249, citing, on question of power, *In re Livingston*, 34 N. Y. 557; *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. 322; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805.

<sup>289</sup> See *In re Curtis*, 142 N. Y. 219, 36 N. E. 887; *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281; *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311.

<sup>290</sup> Legacies of \$500 to collaterals, and legacies to lineal heirs exceeding \$10,000, under the New York act of 1892, are taxable where the aggregate estate of the testator exceeds those amounts. See *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. See, also, chapter 3, § 41; chapter 5, § 53.

<sup>291</sup> As to liability of executor and legatee inter se, see chapter 7, § 64. As to the taxation of legacies given to executors in lieu of commissions, see chapter 7, § 63. See, also, *In re Sidell's Estate*, 8 N. Y. Law J. 1404; *In re Meyers*, 5 N. Y. Law J. 532; *In re Gould*, 13 N. Y. Law J. 781.

<sup>292</sup> *Com. v. Smith*, 5 Pa. St. 142; *In re King's Estate*, 11 Phila. 27. See "legacy" defined, 36 Geo. III. c. 52, § 7; 8 & 9 Vict. c. 76, § 4; 16 & 17 Vict. c. 57, § 1; *In re Miller*, 7 N. Y. Law J. 308. The legacy of a slave was held taxable under the early Maryland statute. *State v. Dorsey*, 6 Gill, 388.

or for services rendered the decedent upon request, is not a gift, legacy, or property within these laws, and hence is not liable to taxation.<sup>293</sup>

Where a bequest is made to a creditor on condition that he accepts it in full of all unsettled accounts and claims against testator, it is not subject to the tax, where it appears that such accounts exceed the sum bequeathed.<sup>294</sup>

The test as to whether a legacy is in payment of a debt or is a gratuity liable to taxation was recently considered by Kennedy, S.,<sup>295</sup> in a case where the decedent left a legacy to a physician "in view and in consideration of his unremitting care and attention to me during my years of sickness, without asking any reward for services rendered." The court held that this was a voluntary gift, and taxable. Kennedy, S. "The estate which passes to an heir or legatee and upon which a tax is to be assessed, is the amount which remains to be distributed after all the debts and funeral expenses are paid. Hence, the existence of a claim which the testator might be honorably, but not legally, bound to pay, is insufficient. It must be one to which there is no legal defense, and which the creditor can enforce by legal proceedings. If this were not the legal rule, a testator might, either designedly or otherwise, defeat the object of the statute, and render it practically useless by simply reciting in his will that the legacy is in consideration of care, attention, kindness, favors received from or services performed by, the legatee at some period of the testator's life. The reasons which a testator may give for making a legacy, while appropriate in explanation of his motives, cannot be made use of,

<sup>293</sup> *In re Quinn's Estate*, 8 Wkly. Notes Cas. 312; *In re Rogers' Estate*, 2 Con. Sur. 198, 10 N. Y. Supp. 22; *In re Reilly's Estate*, 3 N. Y. Law J. 796.

<sup>294</sup> *In re Underhill's Estate* (Surr.) 20 N. Y. Supp. 134.

<sup>295</sup> *In re Doty's Estate*, 7 Misc. Rep. 193, 27 N. Y. Supp. 653. See *In re Wright*, 6 N. Y. Law J. 317.

either by himself or his legatee, to shield a legacy from taxation; because a legacy implies a bounty, and not the payment of a debt. Hence, the court, in ascertaining whether a legacy is taxable or not, has the right to determine, not only from the provisions of the will, but by extrinsic facts, if necessary, whether it is a voluntary gift or in payment of a legally enforceable debt. And if it appears that the legacy was a pure gratuity, the legatee, if he accepts it, must take it subject to the conditions upon which it was given, and subject also to the conditions which the law has impressed upon it. The payment of a tax cannot be avoided by the mere phraseology of the will. Declarations of the testator cannot rise above the law and abrogate its provisions. The tax cannot be eluded by the use of words not necessary to make the gift effective. \* \* \* If a testator makes a bequest or devise of property to his executors or trustees in lieu of their legal commissions and allowances, the excess beyond a reasonable compensation for their services is liable to a tax; and we know of no good reason why a legacy in payment for services, care, attention rendered a testator, should not be placed upon the same basis. This course protects the state from fraud, and prevents legatees from avoiding the tax which the statute has demanded. \* \* \* For acts of kindness shown, for favors received, for some act done at an opportune moment, \* \* \* a testator may, at the time of making his will, feel exceeding grateful, and think it his duty to express his appreciation and remembrance of them by legacies to those who have rendered them; but, unless some legal and enforceable claim exist against the testator by reason of them, a legacy thus given in grateful recognition of the kindly act of friends and relatives should be considered a bounty, and not the payment of a debt, unless the debt is in some manner established to the satisfaction of the court, and, for this reason, should not be exempt from taxation."

The state has the right to inquire into the services claimed to have been rendered, their character and value, and to the extent only that the bequest was not a gratuity it would be exempt.<sup>296</sup>

Sums loaned by a testator to his sons, and which his will provided should be included in his estate and divided equally among his children, the loans to be deducted from the share of the children to whom made, are not advancements, but legacies subject to taxation.<sup>297</sup>

Where the bequest of the residue of testator's estate includes a note made by the legatee, the amount of such note is subject to the legacy tax.<sup>298</sup>

Testatrix was indebted to one B. upon a note. B. bequeathed to testatrix the amount of the debt, and the latter, reciting the indebtedness, bequeathed a portion of the same to relatives of B., who claimed it was not taxable, as being a legacy in payment of a debt. Held taxable; that, under the terms of B.'s will, all property was bequeathed to testatrix, and thereby all obligation upon the note ceased. "There was, in no sense, any debt, legal or moral, to the beneficiaries under her own will. They take the legacy by virtue of her bounty, and her recital therein of the note, and the deduction from the face thereof, is simply to measure the amount of the gift to the legatees, and to indicate the reason therefor."<sup>299</sup>

Where testatrix bequeathed all her property to one H., "in consideration of a home for me at his house during my life," and the will was executed pursuant to an agreement that it should be so done, and that H. should provide for her during life, which was done, held, that the legacy was

<sup>296</sup> In re Richardson, 8 N. Y. Law J. 1392.

<sup>297</sup> In re Bartlett (1893) 4 Misc. Rep. 380, 25 N. Y. Supp. 990.

<sup>298</sup> In re Tuigg's Estate (July 10, 1891) 2 Con. Sur. 633, 15 N. Y. Supp. 548.

<sup>299</sup> In re Wright, 6 N. Y. Law J. 317.

not a gift, but the payment of a valid claim, and was therefore not subject to the legacy tax.<sup>300</sup>

So, a debt released by will, where the debt was previously outlawed by the statute of limitations, passes nothing, and the amount of such debt cannot be assessed for the tax.<sup>301</sup>

In England, however, under the legacy act, the rule is different, and the forgiveness of a bond debt by will was held to be a legacy liable to the duty;<sup>302</sup> and in one case, where the testatrix generously provided in her will for the payment of all her husband's debts, the creditors were, nevertheless, compelled to pay the duty.<sup>303</sup>

Where, however, the legacy is a pure gratuity for services rendered testator without expectation of reward or compensation, it is taxable,<sup>304</sup> and where a testatrix, reciting that A. was indebted to her on bond, declared that in case he made no demand against her estate for boarding her she bequeathed him the debt due by him and directed her executors to cancel the bond, the legacy is liable.<sup>305</sup>

<sup>300</sup> *In re Hulse's Estate* (Surr.) 15 N. Y. Supp. 770.

<sup>301</sup> *Stinger v. Com.*, 26 Pa. St. 429. See *Williamson v. Naylor*, 3 *Younge & C.* 208.

<sup>302</sup> *Attorney General v. Holbrook*, 3 *Younge & J.* 114.

<sup>303</sup> *Foster v. Ley*, 2 *Scott*, 438; *Turner v. Martin*, 7 *De Gex, M. & G.* 429.

<sup>304</sup> *In re Gibbons' Estate*, 16 *Phila.* 218.

<sup>305</sup> *Tyson's Appeal*, 10 Pa. St. 220. See *In re Tuigg's Estate*, *supra*.

## CHAPTER VII.

### SURROGATES, DISTRICT ATTORNEYS, COUNTY TREASURERS, REGISTERS, EXECUTORS, AND OTHER OFFICERS.

- § 62. Surrogates, District Attorneys, County Treasurers, Registers, and Appraisers.
- 63. Executors, Administrators, and Trustees.
- 64. Liability of Executors, Administrators, Trustees, Heirs, and Legatees inter Se.
- 65. Compromises between Public Officers, Executors, and Legatees.

#### § 62. Surrogates, District Attorneys, County Treasurers, Registers, and Appraisers.

Under collateral inheritance, legacy, and succession tax laws various powers, duties, and liabilities in connection with the assessment, collection, and payment of the tax are imposed upon surrogate, probate, and orphans' courts, district attorneys, registers, county treasurers, executors, administrators, trustees, appraisers, and other persons and officials, which it is proposed to consider in the present chapter. As these duties are principally statutory, some of the provisions of law relating thereto may be consulted in the Appendix.

Questions concerning the appraisement or valuation of estates subject to the tax have been treated separately,<sup>1</sup> and proceedings regarding the remedy and practice to be pursued under these acts have been reserved for the last chapter.<sup>2</sup>

Surrogates' courts in New York are constitutionally empowered to hear and determine all questions relating to the

<sup>1</sup> Chapter 5.

<sup>2</sup> Chapter 8.

estates of decedents arising under these statutes,<sup>3</sup> and it would appear that exclusive jurisdiction, in the first instance, has been conferred upon the surrogate to appoint the appraiser who is to value the taxable property, and upon his report to assess, fix, and determine the liability of property to this tax, and to enforce payment thereof, subject to review by appeal, as in other cases.<sup>4</sup>

The initial steps which the statute requires the surrogate to take are those of taxing officers, and not of judges. He appoints an appraiser to appraise the cash value of the property. Upon the coming in of the report he may enter an order determining the cash value of the estate: The order may be based upon the report, or upon any other proof before him, and this he does "as of course." But the party aggrieved may take an appeal from the order thus made to the surrogate, and then for the first time the procedure takes on a judicial character.<sup>5</sup>

The act of 1887<sup>6</sup> provided that the surrogate should have jurisdiction to hear and determine all questions in relation to the tax. The same provision is contained in the transfer tax act of 1892.<sup>7</sup> The power and jurisdiction of the surrogate under these acts is now definitely settled under the New York statutes by many recent adjudications. He has full power to determine all questions of liability or exemption. When we read all the provisions of these acts it is perfectly apparent that an especial system of taxation was created

<sup>3</sup> In re McPherson, 104 N. Y. 323, 324, 10 N. E. 685.

<sup>4</sup> Appendix, I. a, Laws N. Y. 1887, c. 713, § 15; In re McPherson, *supra*. See U. S. v. Trucks, 27 Fed. 541; Central Trust Co. v. New York City & N. R. Co., 47 Hun, 587; *Id.*, reversed on another point, 110 N. Y. 250, 18 N. E. 92; Anderson v. Anderson, 112 N. Y. 104, 113, 19 N. E. 427. See chapter 5, §§ 50, 55.

<sup>5</sup> Weston v. Goodrich (1895; Sup.) 33 N. Y. Supp. 382.

<sup>6</sup> Chapter 713, § 15.

<sup>7</sup> Appendix, I. e, c. 399, § 10.

for the benefit of the state with all the necessary machinery for its working; the control with respect to which was vested in the surrogate's court, with a jurisdiction exclusive in its nature. In the assessment of a tax upon property passing by will or by the intestate law the responsibility is imposed by law upon the surrogate. He acts for the state, and he is commanded to assess and fix the tax to which the property is liable; and his authority to assess involves the necessity as well as the power to determine the question of liability, as much as it does in the case of assessors of taxes in the general scheme of taxation.<sup>8</sup>

Under this power it has been held, under the act of 1887, that the surrogate's decree obtained by the executor of a decedent exempting certain institutions from taxation, without previous notice to any state official, was conclusive upon the state,<sup>9</sup> and a bar to any proceeding by the state thereafter to recover the tax alleged to be due; the court holding that no state official was entitled to notice under that act.<sup>10</sup> By the act of 1892, however,<sup>11</sup> notice of these proceedings is now required to be given to the county treasurer or comptroller, and the proceeding will be void without such notice.<sup>12</sup>

Under these provisions of the statutes the surrogate has full power to construe a will. Hence where the will of decedent attempted to create certain trusts for the disposition of his residuary estate, which were void as contravening the statute against perpetuities, and were so conceded, and the bene-

<sup>8</sup> *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156, reversing 66 Hun, 389, 21 N. Y. Supp. 515, 522, distinguished in *Re Smith's Estate* (Surr.) 23 N. Y. Supp. 762. *In re Ullmann*, 137 N. Y. 403, 33 N. E. 480; *Weston v. Goodrich* (Sup.) 33 N. Y. Supp. 382; *In re Park's Estate*, 8 Misc. Rep. 550, 29 N. Y. Supp. 1081.

<sup>9</sup> As to conclusiveness of surrogate's decree, see *Bliss*, Code Civ. Proc. N. Y. (4th Ed.) § 2743.

<sup>10</sup> *In re Wolfe*, *supra*.

<sup>11</sup> Appendix, I. e, c. 399, § 12.

<sup>12</sup> Chapter 8, pp. 391, 400.



ficiaries under the residuary clause abandoned all claim to the real estate embraced therein to the heirs, who sold it, received the consideration therefor, and out of the purchase money made provisions for payment of the tax in case they were held liable, the surrogate has jurisdiction to determine that the residuary estate did not pass to the legatees or devisees, but to the heirs and next of kin, and that a decree assessing the heirs for that portion of the estate which passed to them was valid.<sup>13</sup>

In the Ullmann Case it was held that the surrogate's court had power to decide under these statutes every question that may arise in a proceeding under the act which may be necessary to fully discharge the duties imposed by it. Said court, therefore, may and must decide whether any property of the decedent has passed to another under the will or under the laws of intestacy, and so may determine as to whether dispositions made by a will of decedent are void, and if so that the property embraced therein has passed to heirs or next of kin, under the statutes of descent and distribution.<sup>14</sup>

The surrogate has power to pass upon the validity of a bequest in the appraisement proceeding.<sup>15</sup>

Under these provisions,<sup>16</sup> he has power, where there are debts subsequently proved against the estate, to direct a transfer tax to be refunded while it is still in the hands of the county treasurer.<sup>17</sup>

And where the tax has been paid into the state treasury, and debts are subsequently proved, the state comptroller

<sup>13</sup> In re Ullmann, 137 N. Y. 403, 33 N. E. 480, reversing 67 Hun, 5, 21 N. Y. Supp. 758.

<sup>14</sup> In re Ullmann, *supra*.

<sup>15</sup> In re Bradshaw, 13 N. Y. Law J. 854; citing In re Ullmann, *supra*.

<sup>16</sup> Laws 1892, c. 399, § 10.

<sup>17</sup> In re Park's Estate, *supra*.

may be authorized to refund an equitable proportion of the tax paid.<sup>18</sup>

The jurisdiction of the surrogate being, in the first instance, exclusive, the supreme court of the state has no jurisdiction to determine, in the first instance, whether property of a deceased person is subject to a collateral inheritance or transfer tax under these statutes, even though such question be raised in an action in equity in which other forms of relief are demanded which are within such court's jurisdiction.<sup>19</sup> Parker, J., said: "Instead of providing for the appointment of assessors or collectors or taxing officers, under some other name, to execute the provisions of the law, the legislature not unwisely determined that the surrogates of the several counties of the state were in a position to more economically and effectively enforce collection of the tax than any other agency that could be devised, and so the surrogates were made special taxing officers, and charged with the duty of enforcing the collection of this special state tax, upon such notice to those interested, and in the manner provided by the statute. That the statute constituted the surrogate, and he alone, the assessing and taxing officer, and, as such, the only representative of the state, in the first instance, for all purposes relating to the appraisement and taxation of property, will clearly appear, from a brief reference to certain of its provisions."<sup>20</sup> \* \* \*

The supreme court has no jurisdiction to make an assessment which the town assessor is required to make, in the first instance, nor has it, in the absence of statutory author-

<sup>18</sup> *In re Park's Estate*, supra; citing Laws 1892, c. 399, § 6.

<sup>19</sup> *Weston v. Goodrich*, supra, citing *In re Wolfe* and *In re Ullmann*, supra, and distinguishing cases in which jurisdiction had been exercised by the supreme court without being questioned. See *McVean v. Sheldon*, 48 Hun, 163; *Catlin v. Trustees of Trinity College*, 49 Hun, 278, 1 N. Y. Supp. 808; *Id.*, 113 N. Y. 133, 20 N. E. 864; *Talmadge v. Seaman*, 9 Misc. Rep. 303, 30 N. Y. Supp. 304, reversed as *In re Seaman* (Oct. 8, 1895; Ct. App.) 41 N. E. 401.

<sup>20</sup> The court then cited Laws 1892, c. 399, §§ 10, 11, 13, 15, 18.

ity, the right to usurp the functions of the surrogate, as a taxing officer under the taxable transfer act. The question of liability to taxation is a fact to be determined by the assessors, and which gives them jurisdiction to assess. It is a conditional step in the proceeding for assessment; and the court cannot, in advance of action by the assessors, take that question away from them. \* \* \* Authority to pass upon the merits of assessments has been conferred upon the court by statute;<sup>21</sup> but authority to assess or command the assessment of taxes is neither a part of the original jurisdiction of the supreme court nor has it ever been conferred upon it by the legislature, which alone has power to determine all questions of state necessity involved in ordering a tax, and in selecting the agencies for its collection."

But by an act passed by the New York legislature of 1895, after the rendition of the above decision,<sup>22</sup> it is now provided that the supreme court of the state may exercise jurisdiction in cases of fraudulent, collusive, or erroneous assessments, the act providing that, within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment, or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties, and receive the compensation provided by sections 11 and 12 of the act. The report of such appraiser shall be filed with the justice by whom he was appointed,

<sup>21</sup> Laws 1880, c. 260.

<sup>22</sup> Appendix, I. e, Laws 1895, c. 556, amending Laws 1892, c 399.  
§ 13.

and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller. Proceedings have already been initiated by the state comptroller under this act.

The surrogate first acquiring jurisdiction under the act retains such jurisdiction throughout all proceedings, even as to real estate situate in another county; hence the tax should be paid in the county where jurisdiction is first acquired.<sup>23</sup>

Where the surrogates of the county of New York cannot act, it would seem that the court of common pleas for that county may exercise jurisdiction.<sup>24</sup>

Subject to the right of review by appeal, the surrogate is deemed to be the superior authority upon all questions, including that of the value of the estate which is subject to the tax.<sup>25</sup>

He is not bound by the appraiser's report, or by the facts which appeared before him, but he may hear such new evidence and statements as may be properly presented.<sup>26</sup>

As we have already seen,<sup>27</sup> his decree declaring an exemption under the acts of 1885 and 1887 was held conclu-

<sup>23</sup> In re Keenan (Surr.) 5 N. Y. Supp. 200; In re Keith's Estate (Surr.) 5 N. Y. Supp. 201.

<sup>24</sup> In re Cunningham, 7 N. Y. Law J. 954.

<sup>25</sup> In re Astor, 6 Dem. Sur. 402, 2 N. Y. Supp. 630; In re Frowe, 3 N. Y. Supp. 134; Frazer v. People, 6 Dem. Sur. 174, 3 N. Y. Supp. 134. See Stinger v. Com., 26 Pa. St. 424; Strode v. Com., 52 Pa. St. 186.

<sup>26</sup> In re McPherson, supra; In re McGowan's Estate, 3 N. Y. Law J. 888.

<sup>27</sup> In re Wolfe, 137 N. Y. 205, 33 N. E. 156, distinguished in Re Smith's Estate (Surr.) 23 N. Y. Supp. 763.

sive upon the state and its officials, even where they were not notified, or given proper opportunity to be heard.<sup>28</sup>

But now, by the act of 1892,<sup>29</sup> the county treasurer, or comptroller of the county, must be notified of all proceedings under the act, otherwise they are void, as against the state.<sup>30</sup>

The surrogate's decree is conclusive, however, upon the rights of an adopted son, who had legal notice of the appraisal, and the decree is unaffected by a subsequent change or amendment of the law.<sup>31</sup>

No proceeding will be made by the surrogate, of his own motion, to enforce payment of the tax, until the expiration of 18 months from the decedent's death.<sup>32</sup>

He has power to enforce his decrees under these statutes by such proceedings and methods as are provided for the enforcement of the usual decrees of his court.<sup>33</sup>

Against persons interested in the property liable to the tax, other than executors, administrators, and trustees, the surrogate has the power, on return of an execution issued on his decree, to enforce it by proceedings for contempt;<sup>34</sup>

<sup>28</sup> Chapter 8, § 66; *In re Wolfe*, supra. See post, p. 398; *In re McPherson*, supra; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>29</sup> Appendix, I. e, c. 399, § 12.

<sup>30</sup> Chapter 8, § 66, p. 398.

<sup>31</sup> *In re Miller*, 6 Dem. Sur. 119, affirmed 47 Hun, 394; *Id.*, 110 N. Y. 216, 18 N. E. 139; *In re Astor*, 6 Dem. Sur. 408; *In re Kemeys*, 56 Hun, 117, 9 N. Y. Supp. 182. As to adopted children, see chapter 3, § 37; chapter 8, § 69.

<sup>32</sup> *In re Astor*, supra.

<sup>33</sup> *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *In re Ullmann*, 137 N. Y. 403, 33 N. E. 480.

<sup>34</sup> *In re Prout's Estate* (Surr.) 3 N. Y. Supp. 831; *In re Gilman's Estate*, 6 Dem. Sur. 358; Code Civ. Proc. § 2555; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Pelton's Estate*, 57 Hun, 590, 10 N. Y. Supp. 642; *In re Curtis*, 73 Hun, 191, 25 N. Y. Supp. 909.

also by execution and attachment against the person,<sup>35</sup> but execution should first issue.

As to executors, administrators, and trustees, application for an order directing them to pay the tax may be made to the surrogate without leave.<sup>36</sup>

So it would appear that the surrogate has power to order a reference in these proceedings upon any disputed questions of fact, or to determine them himself, affording the parties the right of examination and cross-examination, or the submission of such proof as he may deem proper.<sup>37</sup> But it is doubtful whether the surrogate has any jurisdiction to compel a legatee to repay an executor for taxes paid by the latter for the legatee's benefit.<sup>38</sup>

It is held that he has no jurisdiction to determine the liability of an executor to pay the tax on motion of the executor, but only by proceedings instituted by the district attorney as provided by the statute.<sup>39</sup>

Upon this subject the law of New York<sup>40</sup> provides, in effect, that whenever the comptroller or county treasurer of any county shall have reason to believe that any tax is due and unpaid, after the "refusal or neglect" of the persons

<sup>35</sup> In re Cockey, 8 N. Y. Law J. 1507.

<sup>36</sup> In re Prout's Estate, *supra*.

<sup>37</sup> See In re Pearsall, 51 Hun, 639, 4 N. Y. Supp. 365; Code Civ. Proc. § 2546; In re McPherson, 104 N. Y. 323, 10 N. E. 685; In re Astor, 6 Dem. Sur. 416 (see this case for rules established by the surrogate of New York county under this act).

<sup>38</sup> See In re Underhill, 117 N. Y. 471, 22 N. E. 1120; In re Keech's Estate (Surr.) 7 N. Y. Supp. 331, affirmed 57 Hun, 588, 11 N. Y. Supp. 265.

<sup>39</sup> In re Farley, 15 N. Y. St. Rep. 729; In re Arnett, 49 Hun, 599, 2 N. Y. Supp. 428; In re Jones, 5 Dem. Sur. 30; In re Vanderbilt's Estate, *supra*. But see In re Wolfe, 137 N. Y. 205, 33 N. E. 156.

<sup>40</sup> Appendix, I. a, Act 1887, c. 713, §§ 16, 17.

interested<sup>41</sup> in the property liable to said tax to pay the same, he shall notify the district attorney of the proper county, in writing, of such failure or neglect, and the latter, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding in the surrogate's court for the enforcement and collection of such tax. By the act of 1892,<sup>42</sup> it is now provided that the district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified,—not more than three months after the date of such citation,—and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax has not been paid as required by law, shall issue such citation; and the service of such citation, and the time, manner, and proof thereof, and the hearing and determination thereon, and the enforcement of the determination or order made by the surrogate, shall conform to the provisions of the Code of Civil Procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon, and its enforcement, so far as the same may be applicable.

The provision requiring the comptroller to have "reason to believe" that a tax is due, and the district attorney "to have probable cause" to believe a tax is due, are evidently synonymous in meaning; and they would seem to disclose an intention on the part of the legislature to vest each of those officials with discretionary power to determine preliminarily, to their own satisfaction, upon the facts of each case, whether, in their judgment, there is good ground for believing a tax to be due and unpaid, so as to warrant the commencement of a proceeding to collect. Hence it would

<sup>41</sup> As to meaning of "persons interested," see *In re Arnett*, supra; *In re Wagner's Estate*, 119 N. Y. 32, 23 N. E. 200.

<sup>42</sup> Laws 1892, c. 399, § 15, as amended Laws 1895, c. 378, § 1.

seem that their mere reasons for believing a tax to be due and unpaid cannot be controverted by the party against whom the proceeding is brought.<sup>43</sup>

The law <sup>44</sup> has reference only to a case where a tax is due and has not been paid. The tax may be due because the surrogate had so determined,<sup>45</sup> or, where no proceedings have been had for appraisement, etc., the comptroller and district attorney may believe a tax to be due, and in either case the machinery may be set in motion to collect through the provisions of the statute.<sup>46</sup> In such a proceeding the question of liability can be determined by the surrogate.<sup>47</sup>

From the fact that the act requires the proceeding to be prosecuted by the district attorney, it would seem proper to institute it in his name. He has the right to prosecute to decree the proceeding instituted by him to compel payment of the tax; and where begun first by him it has precedence over any proceeding begun by the executor.<sup>48</sup> The established practice in New York county, and, perhaps, elsewhere in the state, is for the last-named officer to petition the court upon his own verified petition,<sup>49</sup> setting forth the necessary facts,<sup>50</sup> and citing, upon due notice, all persons interested in the property liable to the tax, to wit, the county treasurer or comptroller, the executor, administrator, or trustee, and the legatees or devisees entitled to the taxable interest, to show cause why the tax should not be paid. These persons, and all others interested in the estate, are entitled to no-

<sup>43</sup> See *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>44</sup> Section 17 of the act of 1887.

<sup>45</sup> Under Laws 1887, § 13.

<sup>46</sup> Laws 1887, §§ 16, 17.

<sup>47</sup> *In re Wolfe*, 137 N. Y. 205, 213, 33 N. E. 156, distinguished in *Re Smith's Estate* (Surr.) 23 N. Y. Supp. 762.

<sup>48</sup> *In re Eaton*, 13 N. Y. Law J. 622.

<sup>49</sup> See Forms, Appendix, 527.

<sup>50</sup> *In re Vanderbilt's Estate*, supra. See *In re Arnett*, 49 Hun, 603, 2 N. Y. Supp. 428.



tice, in order that they may have an opportunity to be heard upon the proceeding. The proceeding, as to persons not notified or heard, becomes absolutely void.<sup>51</sup>

But the district attorney has no power to institute any proceedings to collect the tax unless and until notified by the comptroller or county treasurer of such refusal or neglect<sup>52</sup> of the persons liable to pay the tax.<sup>53</sup> The district attorney, though not formally cited, is, however, a proper party upon a final accounting of an executor, as being interested in the estate,<sup>54</sup> upon behalf of the state, for the purpose of collecting the tax, and even though the state has not been cited;<sup>55</sup> though upon such a proceeding it seems he will not be entitled to the payment of the tax until the tax has been fixed, after citation to all persons interested, as required by the act.<sup>56</sup>

Under the act of 1887, in order to afford the representatives of the estate a reasonable time in which to settle its

<sup>51</sup> Chapter 8, § 66; *In re McPherson*, 104 N. Y. 322, 323, 10 N. E. 655; *In re Miller's Estate*, 110 N. Y. 216, 224, 18 N. E. 139; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>52</sup> See *Frazer v. People*, 6 Dem. Sur. 174. Under the acts of congress a refusal or neglect only arises after demand made. *U. S. v. Pennsylvania Co.*, 27 Fed. 539.

<sup>53</sup> *In Re Jones*, 5 Dem. Sur. 30, it was suggested that the only way by which the surrogate can compel the executor or administrator to pay the tax is to refuse to allow him credit upon his accounting, etc. But it is apparent that the district attorney is given ample power under the act to proceed directly on notice from the county treasurer or comptroller. See Appendix, I. a, c,—Laws 1887, c. 113, § 17; Laws 1892, c. 399, § 15; Laws 1895, c. 378, § 1; *In re Arnett*, supra; *In re Vanderbilt's Estate*, supra; *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156.

<sup>54</sup> Words "person interested in the estate" defined. *In re Wagner's Estate*, 119 N. Y. 32, 23 N. E. 200.

<sup>55</sup> *In re Arnett*, supra; citing Code Civ. Proc. § 2731.

<sup>56</sup> Laws N. Y. 1887, c. 713, §§ 13-16.

affairs it was held that no proceedings could be commenced upon behalf of the state to compel payment of the tax until after the expiration of 18 months from decedent's death.<sup>57</sup>

Where a tax is unpaid, and a proceeding is instituted by the district attorney under the statute to collect the same, the executor or trustee becomes personally liable for the costs,<sup>58</sup> the amount of which was regulated by the Code under the acts in existence prior to the act of 1892.<sup>59</sup> Such costs are now regulated by the act of 1892,<sup>60</sup> which provides that the costs awarded by any decree of the surrogate, after the collection and payment of the tax to the treasurer or comptroller, may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed, in any case where there has not been a contest, the sum of \$100, or, where there has been a contest, the sum of \$250.

It seems the district attorney is not entitled to costs unless he is successful.<sup>61</sup> An application for costs, under this section, which alleges the filing of a petition to compel payment of the tax, the issuance of a citation thereon, and that the proceeding was commenced in good faith, after notice from the comptroller that the tax had not been paid, but

<sup>57</sup> *Frazer v. People* (Surr.) 3 N. Y. Supp. 134; *In re Astor*, 6 Dem. Sur. 402, 412.

<sup>58</sup> *In re Minturn's Estate*, 3 N. Y. Law J. 804; *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>59</sup> Code Civ. Proc. § 2561; *In re Stucke*, N. Y. Daily Reg. April 25, 1889; *In re Pond*, N. Y. Daily Reg. June 13, 1889. But see *In re Enston*, 5 Dem. Sur. 95. Under section 2561 the district attorney is entitled to \$70 where there is a contest and \$25 where there is no contest. *In re Stucke*, supra. As to what is not a "refusal or neglect" to pay taxes, so as to bar the district attorney from costs under section 17 of the statute, and when he is entitled to costs under section 19, Act 1887, see *Frazer v. People*, supra.

<sup>60</sup> Chapter 399, § 15, as amended by Laws 1895, c. 378.

<sup>61</sup> *In re Clarke*, 10 N. Y. Law J. 775; *In re McCarthy's Estate* (Surr.) 25 N. Y. Supp. 987.

which did not show facts from which the surrogate could determine as to the existence of "probable cause" for the proceeding, is insufficient to warrant the surrogate in granting costs.<sup>62</sup>

Ransom, S., said: "It will be seen, therefore, that the section provides clearly and systematically for the manner in which the expenses of these three proceedings shall be defrayed: First. For proceedings, instituted by the district attorney, in which he is successful in collecting the tax. That it refers to successful proceedings is apparent from the provision that the costs may be retained by the district attorney for his own use. Such costs, except as to the amount, are governed by the section of the Code and the rules of the court applicable to other proceedings therein. Rule 22 prescribes the practice whenever a party shall deem himself entitled to costs which include any disbursements to which he may believe himself entitled."<sup>63</sup> Second. For proceedings in which the district attorney is unsuccessful. This is intended as a precaution against the indiscriminate commencement of proceedings without sufficient preliminary inquiries, and calls for the judicial determination by the surrogate, upon proof, that there was probable cause for commencing the same. The affidavit in the case at bar simply sets forth that the comptroller notified the district attorney, and that the proceedings were commenced in good faith. It furnishes no evidence as to the facts and circumstances from which the court may form an opinion as to the existence of probable cause. That the comptroller believed that there was a tax due, and that the district attorney had probable cause to believe that the tax was due, is not sufficient basis on which this court should find judicially that probable cause existed."<sup>64</sup>

<sup>62</sup> In re McCarthy's Estate (Surr.) 25 N. Y. Supp. 987.

<sup>63</sup> Code Civ. Proc. N. Y. § 2559.

<sup>64</sup> In re McCarthy's Estate, supra.

Where the comptroller or county treasurer is a successful party, the Code <sup>65</sup> applies, and he is entitled to \$70 costs of contest and \$10 each for trial days exceeding two; and the surrogate's discretion in awarding costs will not be reviewed on appeal except for sufficient cause.<sup>66</sup>

The tax should be paid to the treasurer of the county where jurisdiction is first acquired.<sup>67</sup>

In New York the county treasurer or comptroller must pay the appraiser's fees out of any moneys in his hands received on account of taxes, even though he may have received nothing as yet from the estate appraised by the appraiser; and mandamus will lie to compel him to pay the fees due.<sup>68</sup>

In Pennsylvania <sup>69</sup> the proceedings to collect, where the tax is not paid, within one year after decedent's death, to the register of wills, are begun in the orphans' court,<sup>70</sup> by bill or petition filed by the register. And the court is authorized, upon his application, to cite the executor or administrator to file an account or to cite them and the heirs to show cause why the tax should not be paid; and the register may thus compel payment from the executor or administrator who has neglected to pay the tax.<sup>71</sup>

<sup>65</sup> Bliss, Code Civ. Proc. (4th Ed.) § 2561.

<sup>66</sup> *In re Hoffman's Estate*, 76 Hun, 399, 27 N. Y. Supp. 1086.

<sup>67</sup> *In re Keenan* (Surr.) 5 N. Y. Supp. 200; *In re Keith's Estate* (Surr.) 5 N. Y. Supp. 201. Quære, as to the right of the comptroller or county treasurer to sue the executor at law for these taxes. See *In re Jones*, 5 Dem. Sur. 36; *Montague v. State*, 54 Md. 482; *Torrey v. Willard*, 55 Hun, 78, 8 N. Y. Supp. 392.

<sup>68</sup> *In re Murray*, per Bartlett, J., Kings Co., N. Y. Sup. Ct., opinion not reported. As to commissions of county treasurer and effect of his receipt for taxes, see *In re Keenan*, supra.

<sup>69</sup> See Scott, Intest. Laws (Pa.) p. 1871.

<sup>70</sup> Appendix, III., Laws 1887, p. 79, §§ 14, 15.

<sup>71</sup> *In re Cullen's Estate*, 26 W. N. C. 216. As to duties of register and liability of his sureties, see *Com. v. Toms*, 45 Pa. St. 408; Scott, Intest. Laws, p. 315. Effect of register's receipt in full for taxes,

**§ 63. Executors, Administrators, and Trustees.**

In New York, Pennsylvania, and many other states the statutes substantially provide that all executors, administrators, and trustees shall be personally liable for any and all legacy and succession taxes until the same shall have been paid as directed by law.<sup>72</sup> The commonwealth has a right to be heard on the question of the appointment of an administrator in respect to estates subject to the tax. A claimant otherwise entitled will be refused letters of administration, where it is shown that he has authorized or permitted the removal of personal property of decedent from the state, when the tendency of such removal is to the hindrance or delay of the state in the collection of the inheritance tax, or the lessening of her security therefor.<sup>73</sup>

Generally, in all cases where such taxes are not paid within a year after decedent's death, such executors, administrators, and trustees must give a bond conditioned to pay the same, with interest.<sup>74</sup> Under the New York act of 1892,<sup>75</sup> such taxes are due and payable at the time of the transfer, i. e. the death of decedent, excepting in case of contin-

see *In re Brewer's Estate*, 15 Pittsb. Law J. 435; 16 Pittsb. Law J. 114. As regards interest, see *Appeal of Commonwealth (Fagely's Estate)* 128 Pa. St. 613, 18 Atl. 386. As to fees of county treasurers and their successors, see *Stephen v. Com.*, 4 Watts, 123.

<sup>72</sup> Appendix, I. a, e. III., VII., VIII.,—Laws N. Y. 1887, § 1; Laws 1892, c. 399, § 3; Laws Pa. 1887, p. 79, § 1; Laws Conn. 1889, c. 180, §§ 1, 16; Laws Md. 1888, p. 242, § 102. See *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Minturn's Estate*, 3 N. Y. Law J. 804; *In re Boyd's Estate*, 4 Wkly. Notes Cas. 510; *In re Cullen's Estate*, 26 Wkly. Notes Cas. 216. For note on "Executor's Duty as to Inheritance Tax," see 29 Abb. N. C. 358.

<sup>73</sup> *Robertson's Estate* (1892) 49 Leg. Int. 190, 1 Pa. Dist. R. 317.

<sup>74</sup> Appendix, I. a, e. VIII.,—Laws N. Y. 1887, c. 713, § 4; Laws N. Y. 1892, c. 399, § 7; Laws Md. § 117.

<sup>75</sup> Laws 1892, c. 399, § 3.

gent or future estates, where the fair market value cannot be ascertained at the time of the transfer. In such cases the tax becomes due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. The tax shall be paid to the treasurer or comptroller of the county of the surrogate having jurisdiction; and said treasurer or comptroller shall give, and every executor, administrator, or trustee shall take, duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof, and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator, or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due, unless he shall produce a receipt so sealed and countersigned by the comptroller, or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by the act.<sup>76</sup> And by further provision the executor or administrator is required to deduct the tax from any legacy or property subject to the tax before paying the legacy over to the legatee;<sup>77</sup> and he cannot deliver or be compelled to deliver any specific legacy or property subject to the tax to any person until he shall have collected the tax thereon.<sup>78</sup>

Such executors have full power to collect the tax from

<sup>76</sup> Laws 1892, c. 399, § 7.

<sup>77</sup> Appendix, I. a, e, III., VII., VIII.,—Laws Md. §§ 103, 104, 114; Laws Conn. § 5; Laws N. Y. 1887, c. 713, § 6; Laws N. Y. 1892, c. 399, § 5; Laws Pa. § 5.

<sup>78</sup> Cases *supra*; *In re Howe*, 112 N. Y. 103, 19 N. E. 513, affirming 48 Hun, 235. See *Com. v. Smith*, 5 Pa. St. 144; *In re King's Estate*, 11 Phila. 26; *Com. v. Coleman*, 52 Pa. St. 473.

the legatee, and to sell so much of the property of the decedent as will enable them to pay the tax.<sup>79</sup>

Where the funds in the executors hands are sufficient to pay legacies and to satisfy all disputed claims, the executor may pay the legacies; but he should be protected in respect to any transfer tax, interest, and penalty. He was directed to pay the legacies, retaining 10 per cent. of each legacy to cover the last-named items.<sup>80</sup>

In New York the liability of the administrators, executors, or trustees is regulated by the statute of 1892,<sup>81</sup> providing that where they have in charge or trust any legacy or property for distribution, subject to said tax, they shall deduct the tax therefrom, or, if the legacy or property be not money, they shall collect the tax thereon, upon the appraised value thereof, from the legatee or person entitled to such property, and they shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until they shall have collected the tax thereon. When the executor has collected the tax upon the appraised value of the property except money, his duty is ended. If he pays the legacy, or any portion of it, without first deducting the tax, he becomes personally liable to the state for the amount. He must collect the tax upon personal property from the assets within his hands, and he is not authorized to collect it from any other source. Whether a legacy is of much or little value, or whether it will sell for its face or not, is a matter with which he has nothing to do, and over which he has no control. He must deduct the tax or collect it from the property in his hands. He can maintain no action against the legatee for

<sup>79</sup> Appendix, I. a, e, III., VII., VIII.—Laws N. Y. 1887, c. 713, § 7; Laws N. Y. 1892, c. 399, § 5; Laws Md. §§ 104, 114; Laws Conn. § 8.

<sup>80</sup> In re Perkins, 13 N. Y. Law J. 1152.

<sup>81</sup> Laws 1892, c. 399, § 5.

the recovery of the tax on personal property. He must get it from the assets in his hands, and, having done this, his duty is ended.<sup>82</sup>

Where the business of the partnership testator was concerned in was to be continued by the executors till it could be disposed of to advantage, and this course was essential to realizing its full value, the assessment and collection of the tax should be postponed until the beneficiaries come into actual possession.<sup>83</sup>

And they are permitted to receive a fair or reasonable compensation under the will in lieu of commissions, which compensation is exempt from taxation.<sup>84</sup>

Where an executor renounces his commission he is not liable to taxation thereon.<sup>85</sup>

The act of 1892<sup>86</sup> provides that if a testator bequeathes or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases, shall be taxable. This differs from a somewhat similar provision contained in the act of 1887.<sup>87</sup>

Where the will of decedent bequeathed a certain share of her estate to her executors "as extra compensation, in addition to the commissions allowed by law, and in satisfaction of the services they have rendered me during my lifetime,"

<sup>82</sup> *In re Weed's Estate* (1894) 10 Misc. Rep. 628, 32 N. Y. Supp. 779.

<sup>83</sup> *In re Wheeler's Estate*, 1 Misc. Rep. 450, 22 N. Y. Supp. 1075.

<sup>84</sup> Appendix, I. a, III., VII.,—Laws N. Y. 1887, c. 713, § 3; Laws Pa. 1887, p. 79, § 2; Laws Conn. 1889, c. 180, § 3.

<sup>85</sup> *Owings v. State*, 22 Md. 116.

<sup>86</sup> Appendix, I. e, Laws N. Y. 1892, c. 399, § 8.

<sup>87</sup> Appendix, I. e, Laws 1887, c. 713, § 3; *In re Sidell's Estate*, 8 N. Y. Law J. 1404.



held,<sup>88</sup> that the bequest would be taxable to the extent it exceeded a fair compensation for such services.<sup>89</sup>

Where the bequest is not a gratuity, but in lieu of compensation for the executors' services, and the testator has fixed what he deems to be a reasonable compensation, it is exempt. It is the reasonable compensation provided in the will which is the test, for otherwise a testator might bequeath property to a person not exempt, in consideration for insignificant services, and thus evade the tax.<sup>90</sup>

A bequest to an executor of a certain sum over and above his legal commissions and expenses is not within the act of 1887,<sup>91</sup> providing that when a bequest is made to an executor in lieu of commissions the excess of such devise above a reasonable compensation for his services is subject to the inheritance tax.<sup>92</sup>

Where a legacy for services as executors is claimed to be exempt, the state has the right to inquire into the services rendered, their character, and value; and to the extent only that the bequest constituted a gratuity, and not a consideration, it will be taxable.<sup>93</sup>

The burden is upon the executors to prove the extent and value of such services.<sup>94</sup>

Where a provision is made in the will for the executors in lieu of commissions, the question of their liability to taxation will be deferred until an accounting, when the services have been rendered and the reasonableness of the compensation determined. Where an accounting has been had, if it is sought to have the question of the liability of the

<sup>88</sup> Under Act 1892.

<sup>89</sup> *In re Sidell's Estate*, 8 N. Y. Law J. (March 23, 1893) 1404.

<sup>90</sup> *In re Meyers*, 5 N. Y. Law J. 532.

<sup>91</sup> Laws 1887, c. 713, § 3.

<sup>92</sup> *In re Underhill's Estate* (Surr.) 20 N. Y. Supp. 134.

<sup>93</sup> *In re Richardson*, 8 N. Y. Law J. 1392; *In re Meyers*, *supra*; *In re Reilly*, 3 N. Y. Law J. (July, 1890) 796.

<sup>94</sup> *In re Underhill's Estate* (Surr.) 20 N. Y. Supp. 134.

bequests to taxation determined, another appraisement must be had, where proof may be introduced on this issue.<sup>95</sup>

Until the services have been rendered by the executor or trustee, some of the cases hold, the question will be suspended until an accounting is had.<sup>96</sup>

These commissions and expenses of administration are not deductible by the appraiser. In fact, the statute in terms does not authorize the appraiser to deduct anything from the fair market value of the property.<sup>97</sup>

Under any circumstances, inasmuch as the tax is due and payable at death, and the appraisement must be made as of that date, or as soon thereafter as practicable, the state cannot be compelled to wait the final accounting of the executor for the purpose of having it determined whether his commissions are taxable as being in excess of the statutory rate.<sup>98</sup> A contrary view of this subject has recently been taken, holding that the appraiser and surrogate have power to ascertain and deduct the commissions of executors, and expenses of administration.<sup>99</sup> The executors are further authorized, under the New York statutes,<sup>100</sup> to procure the appointment of an appraiser,<sup>101</sup> for the purpose of hav-

<sup>95</sup> *In re Hope*, 8 N. Y. Law J. 1164; *In re Havens*, 3 N. Y. Law J. 900.

<sup>96</sup> *In re Havens*, 3 N. Y. Law J. 900; *In re Hope*, 8 N. Y. Law J. 1164. Executors are only legally entitled to commissions and expenses after an accounting and decree by the surrogate. See Code Civ. Proc. N. Y. § 2730, and notes to 3 Bliss' Code, p. 3200.

<sup>97</sup> See *In re Millward's Estate* (Surr.) 27 N. Y. Supp. 286; *In re Ludlow's Estate* (Surr.) 25 N. Y. Supp. 989; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *Id.*, per Ransom, S., 16 N. Y. Supp. 193, affirmed in 19 N. Y. Supp. 292; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>98</sup> *In re Vassar* and cases *supra*.

<sup>99</sup> *In re Gould*, 13 N. Y. Law J. 781.

<sup>100</sup> Appendix, I. a, e, Laws 1887, c. 713, § 13; Laws 1892, c. 399, § 11.

<sup>101</sup> None is necessary where the legacies are in cash, the surrogate assessing and fixing the tax upon the cash value. *In re Astor*,

ing the tax fixed by the surrogate upon the value appearing in the appraiser's report. It is primarily the duty of the executor to apply for an appraisement, and the power given to the surrogate of his own motion to cause an appraisement to be made and to fix the tax was not intended to relieve personal representatives of this obligation.<sup>102</sup> The subject of the appraisement has already been considered,<sup>103</sup> but such executors, administrators, and all other persons interested in the estate are entitled to notice of the time and place of making the appraisement, and of all other proceedings under these acts.<sup>104</sup>

That it is the duty of every personal representative, where the tax is due, before paying over any legacy or share, to exact from the person who is to receive it a sum sufficient to pay the tax,<sup>105</sup> or to deduct the tax therefrom, unless the will directs the same to be paid from the general estate, has frequently been determined under these statutes.<sup>106</sup>

6 Dem. Sur. 402; *In re Jones*, 5 Dem. Sur. 30; *In re Bird's Estate* (Surr.) 11 N. Y. Supp. 895. Contra, *In re Peck* (Surr.) 9 N. Y. Supp. 465. And see chapter 5, § 51.

<sup>102</sup> *Frazer v. People*, 6 Dem. Sur. 174. But see *In re Farley*, 15 N. Y. St. Rep. 727.

<sup>103</sup> Chapter 5.

<sup>104</sup> Laws 1892, c. 399, § 12; *Coxe's Appeal*, 1 *Purd. Dig.* (10th Ed.) 218; *In re McPherson*, 104 N. Y. 322, 323, 10 N. E. 685; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895.

<sup>105</sup> *Supra*, p. 365; *Sohier v. Eldridge*, 103 Mass. 349; *Hathaway v. Fish*, 13 Allen, 267; *Montague v. State*, 54 Md. 483; *Hunter v. Husted*, Busb. Eq. (N. C.) 141; *Attorney General v. Allen*, 6 Jones' Eq. (N. C.) 141; *Com. v. Coleman*, 52 Pa. St. 473; *In re Howe*, 112 N. Y. 103, 19 N. E. 513, affirming 48 Hun, 235.

<sup>106</sup> *Shippen v. Burd*, 42 Pa. St. 461, 464; *In re Holbrook's Estate*, 3 Pa. Co. Ct. R. 265, 44 Leg. Int. 186; *In re Murphey's Estate*, 4 Pa. Co. Ct. R. 336; *Com. v. Smith*, 5 Pa. St. 145; *Wright's Appeal*, 38 Pa. St. 512; *In re Thomson's Estate*, 5 Wkly. Notes Cas. 19; *Theob. Wills* (1st Ed.) 57.

In New York it is held that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned, and that manifestly, under the law, that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose or under any testamentary direction.<sup>107</sup>

Under the English law in valuing a succession to lands vested in trustees, the cestui que trust cannot deduct, as "necessary outgoings," reasonable expense of management incurred, independently of his control, by the trustees under an authority given by will.<sup>108</sup>

But statutes making it the duty of executors to pay mean domestic executors and administrators, as it is not to be presumed that the legislature intended to control or impose liabilities upon foreign personal representatives or foreign decedents, as they are not subject to its jurisdiction. Such statutes, it has been held, cannot be enforced.<sup>109</sup> But, as we have already seen,<sup>110</sup> the decisions upon this point were based upon the ground that there was no intention on the part of the legislature to tax nonresident decedents. But, where such intention exists, the state has undoubted power to tax the property of foreign decedents within its jurisdic-

<sup>107</sup> In re Swift, 137 N. Y. 77, 32 N. E. 1096.

<sup>108</sup> In re Earl Cowley, L. R. 1 Exch. 288.

<sup>109</sup> Kintzing v. Hutchinson, 34 Leg. Int. 365; In re Enston, 113 N. Y. 180, 21 N. E. 84, by a divided court; In re Tulane, 51 Hun, 213, 4 N. Y. Supp. 36. See In re Romaine, 127 N. Y. 86, 27 N. E. 759. But see In re James, 144 N. Y. 6, 38 N. E. 961; In re Phipps, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed in court of appeals without opinion, 143 N. Y. 641, 37 N. E. 823. See an article entitled "Collateral Inheritance Tax in Connection with Transfer of Stocks and Loans by Foreign Executors and Administrators," by E. H. Blanc, Esq., Alb. Law J. April 16, 1892, p. 331.

<sup>110</sup> Chapter 4, § 47, subd. c.

tion, and to enforce payment of the tax from persons seeking to obtain such property.<sup>111</sup>

So it would seem that domestic executors are not responsible for the tax upon real property situate in another state at the death of the testator, although the proceeds are subsequently brought within the taxing state, as the succession takes place to such property under the law of the place where it is situate.<sup>112</sup>

Hence the state has no power to enforce a tax in the nature of a direct tax, and compel the executor to pay it upon such foreign real estate.<sup>113</sup>

But where the will of a resident directs that his foreign real estate be converted into personalty it is so considered, and the executor will be liable for the tax thereon. This rule exists in Pennsylvania<sup>114</sup> and in England, but in New York the subject of the taxation of real property through the doctrine of equitable conversion has not been definitely determined by the highest courts, and the question remains doubtful.<sup>115</sup>

By the Pennsylvania statute foreign executors and administrators are to pay the tax on stocks transferred within the state, and if they default the corporation permitting the transfer of such stock is liable.<sup>116</sup>

A similar provision in the New York statute was held to

<sup>111</sup> Chapter 4, § 47, subd. b, et seq.

<sup>112</sup> *State v. Brevard*, Phil. Eq. (N. C.) 141; *Alvany v. Powell*, 2 Jones, Eq. 51; *Drayton's Appeal*, 61 Pa. St. 172; *Com. v. Coleman*, 52 Pa. St. 468; *In re Hood's Estate*, 21 Pa. St. (9 Harris) 106.

<sup>113</sup> *In re Bittinger's Estate* (Appeal of Commonwealth) 129 Pa. St. 338, 18 Atl. 132. See *In re Dewey's Estate*, N. Y. Law J. Oct. 21, 1889.

<sup>114</sup> Chapter 4, § 46, subd. b.

<sup>115</sup> See chapter 4, § 46, subd. b; *In re Swift*, 137 N. Y. 77, 32 N. E. 1096, and cases there cited; *In re Curtis*, 142 N. Y. 219, 36 N. E. 887.

<sup>116</sup> See chapter 4, § 47, subd. c; Scott, *Intest. Law Pa.* 1871, p. 547, citing *In re Cook's Estate*, 9 Leg. Int. 50. Contra, *Kintzing v. Hutchinson*, 34 Leg. Int. 365. See *In re Cigala*, 7 Ch. Div. 351.

be unenforceable under the law <sup>117</sup> passed in 1885, but under the amended statute <sup>118</sup> taxing nonresident decedents' estates this provision would appear to be enforceable against the representatives of such decedents seeking to transfer property which was within the state at the time of death.<sup>119</sup>

There are further exceptions to the rule requiring the executor or administrator to deduct the tax, as where real estate passes directly to the devisees, and in intestacy to the heirs. It is then no part of the executor's or administrator's duty to pay the tax. Those who take the lands are liable therefor.<sup>120</sup>

So it would seem that an administrator has no right to pay the tax upon real estate out of the personalty, as his rights and liabilities are limited to the latter property.<sup>121</sup>

In Pennsylvania, if it is an intestate estate, and administration is granted there, to enable the administrator to collect the assets, he pays the tax out of the aggregate of the estate before distribution. If a will be proved and administered, the executor deducts the collateral tax from the devised property, unless the will otherwise directs.<sup>122</sup>

And an executor is not liable, as such, for a collateral tax due the state upon a devise of land to himself, though he be liable as an individual; but his coexecutors are so liable.<sup>123</sup>

<sup>117</sup> *In re Enston*, *supra*.

<sup>118</sup> Appendix, I., Laws 1887.

<sup>119</sup> See chapter 4, § 47, subds. b, c, and cases cited; *In re Ro-  
maine*, *In re James*, and cases *supra*.

<sup>120</sup> *In re Boyd's Estate*, 4 Wkly. Notes Cas. 510; *In re Forbes'  
Estate*, 16 Phila. 356; *Com. v. Coleman*, 52 Pa. St. 468.

<sup>121</sup> *Com. v. Coleman*, *supra*.

<sup>122</sup> *Com. v. Coleman*, *supra*; *Com. v. Smith*, 5 Pa. St. 144; *In re  
King's Estate*, 11 Phila. 26. As to duties of administrator in Penn-  
sylvania under these statutes, see Scott, *Int. Law* (Pa.; 1871) p. 535.

<sup>123</sup> *State v. Brevard*, Phil. Eq. (N. C.) 141. See *In re Farley*, 15 N.  
Y. St. Rep. 727.

But few adjudications have thus far been made in this country determining the extent of the personal liability of executors, administrators, or trustees for the payment of the tax under the statutory provisions heretofore enumerated. Under the English statutes the executor or other representative is held primarily liable to pay the duty,<sup>124</sup> and where such executor fails to deduct the duty, or the legatee fails to pay the amount thereof, both he and the legatee accepting the legacy or share<sup>125</sup> become personally liable for the tax.<sup>126</sup>

Where the executor is compelled to pay the duty, he has an appropriate remedy over against the legatee, the questions relating to which subject are considered in the chapter relating to the remedy and practice under these acts.<sup>127</sup>

It is doubtful whether, under the acts of congress, the executor was liable in personam for the legacy duty.<sup>128</sup>

There was no personal liability upon the legatee unless it appeared that he had custody or possession of the property itself, or of the legacy, and refused to pay the tax after a demand made as required by the statute.<sup>129</sup>

On failure of the executor or administrator to pay, the tax suit was maintainable against the individual in possession to enforce the statutory lien.<sup>130</sup> So, under the succession

<sup>124</sup> *Bate v. Payne*, 13 Q. B. 900.

<sup>125</sup> *Attorney General v. Munby*, 3 Hurl. & N. 826; *Foster v. Ley*, 2 Bing. N. C. 276; *In re McPherson*, 104 N. Y. 323, 10 N. E. 685.

<sup>126</sup> *In re Sammon*, 3 Mees. & W. 381; *Bate v. Payne*, supra; *In re Wilkinson*, 1 Crompt. M. & R. 142; *Hales v. Freeman*, 1 Brod. & B. 391; 15 & 16 Vict. c. 51, § 44; 36 Geo. III. c. 52, § 6; 13 & 14 Vict. c. 97, § 8.

<sup>127</sup> See cases supra, and post, § 64, and chapter 8, § 66.

<sup>128</sup> *U. S. v. Allen*, 9 Ben. 154, Fed. Cas. No. 14,430; *U. S. v. Trucks*, 27 Fed. 541.

<sup>129</sup> *U. S. v. Trucks*, supra; *U. S. v. Pennsylvania Co.*, 27 Fed. 539; 12 Stat. 485, § 112.

<sup>130</sup> *U. S. v. Trucks*, supra.

duty act of congress,<sup>131</sup> the person beneficially interested in the property was the one liable to pay the tax, and not the trustee or executor in whom the legal title vested or to whom a power in trust was given for the benefit of such person.<sup>132</sup>

In Pennsylvania executors and administrators are treated as agents of the state, and, as such, their duty is to retain the tax and pay it over to the proper officers.<sup>133</sup>

The law of that state<sup>134</sup> expressly declares that the tax on real estate shall remain a lien thereon until paid, and that<sup>135</sup> the owners of all estates and all executors, administrators, and their sureties shall only be discharged from liability for the amount of such taxes the settlement of which they may be charged with by having paid the same over as directed by law. This liability is perpetual, and the limitations in the act only apply to purchasers of the real estate.<sup>136</sup>

Where the tax is not paid within the time limited by law, the penalty is properly chargeable to the administrator or executor.<sup>137</sup>

In New York it has recently been determined that a personal liability<sup>138</sup> for the tax is imposed upon executors, administrators, and trustees which continues until the tax has been paid. Such liability becomes fixed where the repre-

<sup>131</sup> 13 Stat. 285; Act June 30, 1864, §§ 126, 127.

<sup>132</sup> U. S. v. Tappan, 10 Ben. 284, Fed. Cas. No. 16,431. See Schier v. Eldridge, 103 Mass. 349; Hathaway v. Fish, 13 Allen, 267.

<sup>133</sup> Seibert's Appeal (Pa. Sup.) 6 Atl. 105; Wright's Appeal, 38 Pa. St. 507.

<sup>134</sup> Appendix, III., Laws Pa. 1887, p. 79, § 3.

<sup>135</sup> Laws Pa. 1887, p. 79, § 1.

<sup>136</sup> Cullen's Estate, 26 Wkly. Notes Cas. 216; James' Appeal, 2 Del. Co. Rep. 164.

<sup>137</sup> In re Palmer's Estate, 2 Del. Co. Rep. 180. See In re Min-turn's Estate, 3 N. Y. Law J. 804

<sup>138</sup> See Laws 1892, c. 399, § 3.



sentatives pay over legacies which are taxable without first deducting the tax therefrom. They are also personally liable for the costs of the proceeding.<sup>139</sup>

In considering the question in the latter state under the act of 1887, Ransom, S., said: "The liability of executors for the tax seems to be certain. Section 1 of the act provides that they shall be liable for any and all such taxes until the same shall have been paid. Section 6 requires an executor having in charge or trust any legacy or property for distribution subject to said tax, to deduct the tax therefrom if it be money; and further provides that he shall not be compelled to deliver any specific legacy or property subject to tax until he has collected the tax thereon. Section 8 requires the payment to the comptroller,<sup>140</sup> within 30 days, of any such sum retained for the tax, and further provides that the executor shall not be entitled to credit in his accounts, nor discharged from liability for such tax until he shall produce a receipt sealed and countersigned by the comptroller."<sup>141</sup> But it was held in that case that certain appraisement proceedings begun by the executors to have the tax assessed and fixed under the statute to which neither the state nor some of the principal legatees were parties was, nevertheless, under the circumstances of that case, binding upon the state so far as the executors were concerned, and relieved them from personal liability. In view of the express language of the statute, quoted from the opinion, it is doubtful whether this result is sound or can be maintained, for the reason that neither the state nor some of the legatees had any notice or were parties to the proceeding, hence they were not bound by the report of the ap-

<sup>139</sup> In re Vanderbilt's Estate (Surr.) 10 N. Y. Supp. 239; In re Minturn's Estate, 3 N. Y. Law J. 804.

<sup>140</sup> Or county treasurer.

<sup>141</sup> In re Vanderbilt's Estate, *supra*.

praiser or by the decree of the surrogate thereon. It would seem that nothing relieves from a tax excepting payment or a decree that is binding upon the state.<sup>142</sup> But in *Re Wolfe*<sup>143</sup> the court held, under the acts of 1885 and 1887, that a decree of the surrogate exempting certain charitable institutions was binding upon the state, although neither it nor any state official had notice of the proceeding; that the statute did not intend they should have any notice. But by the act of 1892<sup>144</sup> it is now required that notice shall be served upon all interested parties, including the county treasurer or comptroller, as representing the state.

It has been held that the question of the executor's liability cannot be determined upon his own motion, and that the only method under the statute by which such liability can be determined is by proceedings instituted by the district attorney on behalf of the state to compel payment of the tax.<sup>145</sup>

But a receipt "in full" for the tax given by the register by mutual mistake justifies the executor in paying the legacies without deduction, and he cannot suffer injury therefor where he has acted in good faith.<sup>146</sup>

But where the receipt is simply for the amount of money fixed by the court, and does not express the idea that the money was received in satisfaction, discharge, or payment of the decree, or of the amount of the tax claimed by the state,

<sup>142</sup> *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *In re Lenox*, 9 N. Y. Supp. 895; *Succession of Dupuy*, 33 La. Ann. 261; *Appeal of Commonwealth (Fagely's Estate)* 128 Pa. St. 603, 613, 18 Atl. 386.

<sup>143</sup> 137 N. Y. 205; 33 N. E. 156, distinguished in *Re Smith's Estate* (Surr.) 23 N. Y. Supp. 762.

<sup>144</sup> Laws 1892, c. 399, §§ 11, 12.

<sup>145</sup> *In re Farley*, 15 N. Y. St. Rep. 727; *In re Arnett*, 49 Hun, 599, 2 N. Y. Supp. 428.

<sup>146</sup> *In re Brewer's Estate*, 15 Pittsb. Leg. J. (N. S.) 345; 16 Pittsb. Leg. J. (N. S.) 114; *Com. v. Freedley*, 21 Pa. St. 33.

it will not act as an estoppel, so as to prevent the state from recovering interest legally due;<sup>147</sup> and a receipt is no protection to the executor, or other representative, as against the state, for taxes due, where they were, by reason of mistake or fraud, omitted to be paid.<sup>148</sup>

The liability under these statutes, of the personal representatives, and of the legatee, where he accepts the legacy or share,<sup>149</sup> is perpetual, and the provision of the statute limiting the lien of the tax to a certain period only applies to purchasers of the realty, and not to such representatives or legatees.<sup>150</sup>

#### § 64. Liability of Executors, Administrators, Trustees, Heirs, and Legatees inter Se.<sup>151</sup>

Except where some personal or fixed liability is incurred by the executor, administrator, or trustee, pursuant to stat-

<sup>147</sup> In re Fagely's Estate, *supra*.

<sup>148</sup> In re Astor, 6 Dem. Sur. 402; In re Brewer's Estate, *supra*; In re Bittinger's Estate, 129 Pa. St. 338, 18 Atl. 132; In re Vanderbilt's Estate, *supra*; In re Keenan (Surr.) 5 N. Y. Supp. 200; In re Smith's Estate (Surr.) 23 N. Y. Supp. 762.

<sup>149</sup> Montague v. State, 54 Md. 483; In re McPherson, 104 N. Y. 323, 10 N. E. 685; In re Vanderbilt's Estate (Surr.) 10 N. Y. Supp. 239; U. S. v. Truck's Adm'r, 27 Fed. 541; U. S. v. Tappan, 10 Ben. 284, Fed. Cas. No. 16,431; Sohler v. Eldridge, 103 Mass. 349; Hathaway v. Fish, 13 Allen, 267. See Torrey v. Willard, 55 Hun, 78, 8 N. Y. Supp. 392; Seibert's Appeal (Pa. Sup.) 6 Atl. 105.

<sup>150</sup> Mellon's Appeal, 114 Pa. St. 572, 8 Atl. 183; In re Cullen's Estate, 26 Wkly. Notes Cas. 216; James' Appeal, 2 Del. Co. Rep. 164. As to when, under the English law, the purchaser of real estate, under agreement to buy free from incumbrances, becomes liable to pay succession duty, as between himself and the vendor, see Cooper v. Trewby, 28 Beav. 194; In re Langham, 60 Law J. Ch. 110; Dugdale v. Meadows, L. R. 9 Eq. 212.

<sup>151</sup> As to when legacies in payment of debts are not liable to tax, see chapter 6, § 61.

ute, in refusing or neglecting to pay the tax when due and payable,<sup>152</sup> it is payable primarily out of the taxable interest by the persons taking the property, or who are beneficially interested therein, and not out of the general estate.<sup>153</sup> Under the New York statute of 1892,<sup>154</sup> the tax is not upon the share of the legatee, as formerly,<sup>155</sup> but is upon the aggregate estate "of the decedent passing to persons not exempt."<sup>156</sup> The same rule prevails in Pennsylvania.<sup>157</sup>

But, in construing wills, questions often arise, under these statutes, between executors, trustees, and legatees *inter se*, as to whether decedent intended that the legacy or devise should be "free" or "clear" of the tax; in other words, whether the tax should be borne by the testator's general estate, and thus paid by the executor or trustee without deduction from the legacy, or solely out of the legatee's interest.<sup>158</sup>

There is no doubt that a testator possesses the general power to relieve the legatees from the payment of the tax by

<sup>152</sup> See section 63, *supra*.

<sup>153</sup> Chapter 3, § 10.

<sup>154</sup> Laws N. Y. 1892, c. 399.

<sup>155</sup> *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866; *In re Howe*, 112 N. Y. 100, 19 N. E. 513.

<sup>156</sup> *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. But see *In re Sterling's Estate* (Surr.; 1894) 30 N. Y. Supp. 385; *In re Skillman's Estate* (Surr.) 32 N. Y. Supp. 780.

<sup>157</sup> *In re Howell's Estate* (Appeal of Philadelphia Protestant Episcopal Mission, 1892) 147 Pa. St. 164, 23 Atl. 403; *In re Mixer's Estate* (1891) 10 Pa. Co. Ct. R. 409, with note by S. H. Thomas, Esq. See, also, note by C. B. Penrose, Esq., 49 Leg. Int. 26. *Contra*, *Com. v. Kerchner*, 6 Law Rev. 308; *Evans' Estate* (1891) 8 Law Rev. 321.

<sup>158</sup> *Hunter v. Husted*, Busb. Eq. 141; *Attorney General v. Allen*, 6 Jones, Eq. 144; *Shippen v. Burd*, 42 Pa. St. 461; *Thomson's Estate*, 5 Wkly. Notes Cas. 19; *Horter's Estate*, 1 Pears. 424; *Murphy's Estate*, 4 Parker, Cr. R. 336; *Holbrook's Estate*, 3 Parker, Cr. R. 265; *Com. v. Smith*, 5 Pa. St. 145; *Wright's Appeal*, 58 Pa. St. 512; *Sohier v. Eldridge*, *supra*; *Hathaway v. Fish*, *supra*; *In re Wilkin-*

throwing it on the residue of the estate where it is sufficient to make payment, but an intention that a devise shall be "free" of the tax, as between the estate and the devisee, must clearly appear. A mere declaration that it is to be clear of all charges and incumbrances, or other legal demands, is not sufficient.<sup>159</sup>

Where the legacy or annuity is expressly relieved, however, by the terms of the will, from the tax, the estate or executor will be liable therefor.<sup>160</sup>

As where the legacy is of a clear or annual net sum, to be paid the annuitant out of the fund set apart, this direction is sufficient to make the estate liable, and relieves the annuity.<sup>161</sup>

The provisions of a will exempting legacies from collateral inheritance tax, and making such tax payable by the executors, applies as well to legacies given by a subsequent codicil as to those contained in the will.<sup>162</sup>

In England, where the will clearly releases the legacy from the duty, it must be paid by the executors.<sup>163</sup>

Under the New York statutes the rule seems to be different. A clause in the will of decedent directed that the amount of the tax upon legacies and devises should be

son, 1 Crompt., M. & R. 160; *In re Howe*, 112 N. Y. 103, 19 N. E. 513; *In re Sherwell*, 125 N. Y. 376, 26 N. E. 464; *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866, where the court say that the tax is upon the individual. See *Com. v. Kerchner*, 24 Wkly. Notes Cas. 260.

<sup>159</sup> *In re Forbes' Estate*, 16 Phila. 356; *In re Horter's Estate*, *supra*; but see *In re Swift*, 137 N. Y. 87, 32 N. E. 1096.

<sup>160</sup> *In re King's Estate*, 11 Phila. 30.

<sup>161</sup> *In re Bispham's Estate*, 46 Leg. Int. 98.

<sup>162</sup> *In re Cummings' Estate* (1892) 30 Wkly. Notes Cas. 430, 12 Pa. Co. Ct. R. 45.

<sup>163</sup> *Barksdale v. Gilliat*, 1 Swanst. 562; *Bailey v. Boulton*, 21 Law J. Ch. 277; *Fisher v. Brierley*, 30 Beav. 267; *Foster v. Ley*, 2 Bing. N. C. 269. See, also, cases cited in *Theob. Wills* (3d Ed.) pp. 136-143.

paid as expenses of administration. Held, that no deduction should be made, from the value of the residuary estate, of the amount of the tax to be assessed upon its value, or upon the prior legacies; that a mode of payment of the tax prescribed by will is something with which the statute is not concerned.<sup>164</sup>

Where, however, the will provided that the devisees should pay "all taxes, ground rents, and other necessary and legal charges upon the real estate devised to them," and that "not wishing such gifts, devises, etc., to be interfered with or lessened," all legitimate charges were to be paid by his executors, it was held that the devisees, and not the estate, were liable.<sup>165</sup>

And where the will bequeathed a fund to trustees to receive the collected income and produce thereof, and, after deducting all proper costs, to pay the residue of such income to the beneficiary, held, that the duties were a charge upon the latter's income.<sup>166</sup>

But where a married woman had a general power of appointment, and by will appointed the fund and nominated executors of her will, they, and not the trustees of the instrument by which the power is created, were held to be the proper persons to administer the trust fund, and the executors were accordingly held liable for the legacy duty.<sup>167</sup>

<sup>164</sup> *In re Swift* (1893) 137 N. Y. 87, 32 N. E. 1096; *Earl Cowley*, L. R. 1 Ex. Ch. 288. As to when succession taxes are chargeable against the residuary legatees, etc., see *In re Van Beuren*, 4 N. Y. Law J. 1600. As to when it is error, on final settlement of executors' accounts, to direct part of the estate to be held for the purpose of paying legacy taxes and expenses of administration, see *In re Lockwood* (1892) 63 Hun, 630, 17 N. Y. Supp. 771.

<sup>165</sup> *Shippen v. Burd*, *supra*.

<sup>166</sup> *Sohier v. Eldridge*, *supra*; *Hathaway v. Fish*, *supra*.

<sup>167</sup> *In re Philbrick's Trust*, 13 Wkly. Rep. 570. See, also, chapter 6, § 61.

Under the laws of New York <sup>168</sup> providing that an heir or devisee shall, out of his own property, satisfy any mortgage to which the land descended or devised is subject, unless the will directs otherwise, the personal estate of a testator who devised land subject to mortgage is not liable for the mortgage debt, to the exoneration of the land, unless the will so provides; and the amount of the mortgage will, therefore, be deducted from the value of the land, in assessing the transfer tax.<sup>169</sup>

Expenditures by trustees directed to invest moneys in lands, in building a mansion house, cannot be deducted from the amount of the estate subject to legacy duty under the English statute making any persons who would become entitled to an estate in the lands purchased liable to such duty, if they become so entitled before the moneys are actually applied.<sup>170</sup>

Where real estate passes directly to the devisees, and in intestacy to the heirs, it is no part of the executor's or administrator's duty to pay the tax. Those who take the lands are liable therefor.<sup>171</sup>

Where the executor or other personal representative has been compelled to pay the tax after he has paid the legacy in full to the heir or legatee without deduction, the question has arisen as to whether such heir or legatee assumes any liability to the executor for the amount of the tax so paid for the legatee's benefit. In such cases the legatees have been held liable, in England,<sup>172</sup> to the executors in

<sup>168</sup> 1 Rev. St. p. 749, § 4.

<sup>169</sup> *In re Kene* (1894) 8 Misc. Rep. 102, 29 N. Y. Supp. 1078.

<sup>170</sup> *Macfarlane v. Lord Advocate* (1894) 6 Reports, 291.

<sup>171</sup> See section 63, *supra*; *In re Boyd's Estate*, 4 Wkly. Notes Cas. 510; *In re Forbes' Estate*, 16 Phila. 356; *Com. v. Coleman*, 52 Pa. St. 468.

<sup>172</sup> See section 63, *supra*, chapter 8, § 66.

actions at law,<sup>173</sup> and the same rule would seem to exist, or at least to be applicable, under the statutes in this country,<sup>174</sup> if not at common law, as for money paid by the executor by compulsion of law for the benefit of the legatee.<sup>175</sup> But it is doubtful whether, in New York, the surrogate's court has jurisdiction over a proceeding of this character, or can compel a legatee to repay. The remedy would seem to be at law.<sup>176</sup>

Where an executor has paid the tax upon a legacy to an infant, with the knowledge and consent of the latter's general guardian, such executor cannot, on a subsequent accounting, be held liable by a guardian ad litem for the amount so paid, upon the ground of an alleged exemption.<sup>177</sup>

Under general law, a tax collector who has become legally liable to account and pay to the public treasury a tax which he failed to collect from the person assessed, and who has been accordingly compelled to pay it, may recover it from the latter as money paid to his use under compulsion of law.<sup>178</sup>

Where decedent's executor destroyed the will and never

<sup>173</sup> *Foster v. Ley*, supra; *Bate v. Payne*, 13 Q. B. 900; *Hales v. Freeman*, 1 Brod. & B. 391. See *In re Sammon*, 3 Mees. & W. 381; *Greville v. Greville*, 27 Beav. 596; *Turner v. Martin*, 7 De Gex, M. & G. 429.

<sup>174</sup> See *Hunter v. Husted*, Busb. Eq. 141; *Attorney General v. Allen*, 6 Jones, Eq. 144; *In re Boyd's Estate*, 4 Wkly. Notes Cas. 510; *In re Forbes' Estate*, 16 Phila. 356; *Montague v. State*, 54 Md. 486; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239.

<sup>175</sup> See, generally, *In re Underhill*, 117 N. Y. 471, 22 N. E. 1120; *In re Keech*, 7 N. Y. Supp. 331, affirmed 57 Hun, 588, 11 N. Y. Supp. 265; *Seibert's Appeal* (Pa. Sup.) 6 Atl. 105; *Large v. McClain* (Pa. Sup.) 7 Atl. 101.

<sup>176</sup> See *In re Underhill*, supra; *In re Keech*, supra.

<sup>177</sup> *Farquharson v. Nugent*, 6 Dem. Sur. 296.

<sup>178</sup> *Ward v. Richardson*, 1 Abb. N. C. 449.



qualified, but, after the testator's death, obtained all the personal property of decedent and invested it in his own name in speculative property, and, when then threatened by a legatee with criminal prosecution, paid over to such legatee the amount of the legacy out of his individual property, no part of which had ever belonged to the testator, held, that the legatee was not liable to pay transfer tax on the amount of her legacy.<sup>179</sup>

Where, in a proceeding under the act, the only proof before the surrogate consisted of an affidavit of decedent's daughter, sole legatee and executrix, in which she alleged there were debts against the estate consisting of promissory notes made by decedent for money alleged to be loaned by the daughter to him, held, that the executrix was incompetent, under the New York statute (Code, § 829), to testify in her own behalf in such proceeding as to personal transactions with decedent.<sup>180</sup>

### § 65. Compromises between Public Officers, Executors, and Legatees.

Under a recent statute in New York <sup>181</sup> the comptroller of the state is authorized, with the approval of the attorney general and a justice of the supreme court of the judicial district in which the former owner resided, to compromise and settle the amount of such tax in any case where controversies have arisen or may arise as to the relationship of the beneficiaries to the former owner thereof.

The English law is broader. The tax may be compounded with the government, where the succession is of such a nature, or so disposed or circumstanced, that the value thereof

<sup>179</sup> *In re Weed's Estate* (1894) 10 Misc. Rep. 628, 32 N. Y. Supp. 777.

<sup>180</sup> *In re Mann*, 11 N. Y. Law J. 1082. See *In re Hunt*, 12 N. Y. Law J. 642.

<sup>181</sup> Laws 1895, c. 378, amending Laws 1892, c. 399, § 15.

shall not be fairly ascertainable under the act, or where, from the complication of circumstances affecting the value, assessment, or recovery of duty, it is deemed expedient to compound, etc.<sup>182</sup>

Where money is received by claimants under a deceased person's will, by reason of a compromise contract between them and the executors, sanctioned by a court having jurisdiction, the money so received does not fall within the category of legacies and distributive shares in intestate estates which are subject to federal revenue taxes.<sup>183</sup>

But, under the English statute, where the testator directed a certain estate to be sold, and the proceeds to be divided between his two sons, but they preferred to take the property themselves under an amicable arrangement, the duty was imposed upon the value of the property, although the division of the estate was not in strict pursuance of the decedent's will.<sup>184</sup>

The tax is not payable on a sum of money which the legatees, who were all collaterals, authorized the executor to pay to a disinherited son of the testator, in pursuance of a compromise whereby the son's caveat is withdrawn and the will admitted to probate.<sup>185</sup>

Hanna, P. J., said: "The question now arises whether the legatees are liable, not only to the collateral tax upon the balance of their legacies, but also to that upon the amount they agreed to pay caveator in compromise and settlement. We have reached the conclusion that under the

<sup>182</sup> 16 & 17 Vict. c. 51, § 39.

<sup>183</sup> *Page v. Rives*, 1 Hughes, 297, Fed. Cas. No. 10,666. But see *Brune v. Smith*, 13 Int. Rev. Rec. 54, Fed. Cas. No. 2,053.

<sup>184</sup> *Attorney General v. Holford*, 1 Price, 426; *Ex parte Sitwell*, 59 Law T. 539.

<sup>185</sup> *In re Pepper's Estate* (Commonwealth's Appeal, 1894) 159 Pa. St. 509, 28 Atl. 353; 50 Leg. Int. 284, 13 Pa. Co. Ct. R. 517; 2 Pa. Dist. R. 211.

most favorable construction of the act, so far as respects the contention on behalf of the commonwealth, they are not so liable, and for the reason that the amount paid the caveator was never received by them as legatees, and, under the act, it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax. It will readily be seen if the contest instituted by the caveator had been successful he would be entitled, under the intestate law, to the entire estate, and freed from the tax. But instead of further litigation he accepted a portion of the estate, relinquished his claim to the balance, and thus, of course, reduced the amount passing to the legatees; and in fact, to the extent of the amount he recovered the will is a nullity."

The tax cannot be imposed upon moneys paid to extinguish the title of persons claiming adversely to decedent, or upon property surrendered by way of compromise to persons so claiming. So held where testatrix devised her estate to a friend, who died pending a contest over the same. The heirs of the devisee compromised with the contestants and surrendered a portion of the estate to them, which was held not liable to taxation.<sup>186</sup>

Testator bequeathed all his interest in a limited partnership association to his brothers. His widow elected to take against his will, whereupon the executors and legatees paid to her a certain sum in full of all her claims against the estate. It was held that this did not affect the right of the state to tax the full value of the deceased partner's interest.<sup>187</sup>

<sup>186</sup> *In re Kerr's Estate* (Commonwealth's Appeal, 1894) 159 Pa. St. 512, 28 Atl. 354; 13 Pa. Co. Ct. R. 431; 50 Leg. Int. 222.

<sup>187</sup> *In re Small's Estate* (Commonwealth's Appeal, 1892) 151 Pa. St. 1, 25 Atl. 23.

## CHAPTER VIII.

## REMEDY AND PRACTICE.

- § 66. Nature of Remedy and Actions and Proceedings Thereunder.  
67. Lien of the Tax, and Its Effect—Statute of Limitations.  
68. Interest and Penalties for Nonpayment of Tax.  
69. Retroactive, Amendatory, and Repealing Statutes.

§ 66. Nature of Remedy and Actions and Proceedings Thereunder.<sup>1</sup>

It becomes important, under statutes imposing collateral inheritance, legacy, and succession taxes, to determine not only the proper remedy and practice to be pursued in proceedings to enforce the liability of person or property to the tax, but also the rights and obligations of different parties to the proceeding, or who are liable to be affected thereby. Some of the questions upon this subject have received partial consideration in the preceding chapter.

Where the proceeding to collect a tax is of a statutory nature, the remedy pointed out by the statute is generally exclusive, and must be strictly followed,<sup>2</sup> but in the absence

<sup>1</sup> For forms and practice under New York statute, see Appendix; *In re Astor*, 6 Dem. Sur. 402, 419, 2 Lawy. Rep. Ann. 825, note; 19 Abb. N. C. 234, note.

<sup>2</sup> See *U. S. v. Pennsylvania Co.*, 27 Fed. 540; *U. S. v. Trucks' Adm'r*, Id. 541; *In re McPherson*, 104 N. Y. 323, 324, 10 N. E. 685; *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156; *Weston v. Goodrich* (Sup.) 33 N. Y. Supp. 382; *In re Hall's Estate* (Sup.) 7 N. Y. Supp. 595; *In re Howard*, 54 Hun, 305, 7 N. Y. Supp. 594; *Anderson v. Anderson*, 112 N. Y. 104, 113, 19 N. E. 427; *Central Trust Co. v. New York City & N. R. Co.*, 47 Hun, 587; Id., 110 N. Y. 250, 18 N. E. 92; *In re New York, L. E. & W. R. Co.*, 110 N. Y. 374, 18 N. E. 120. When a statute gives a new power, and at the same time provides a means for enforcing it, those who claim the power can execute it in no other

of any designated method of procedure in the statute, it seems that the ordinary or common-law methods may be pursued.<sup>3</sup>

Under general tax laws, where an assessment is merely erroneous, and the payment of the tax levied thereon has not been compulsory, the remedy by certiorari to correct the assessment designated by statute is exclusive. Where, however, the assessment is illegal and void, this remedy is not exclusive, and an action at law may be maintained to recover any tax paid under compulsion upon such void and illegal assessment.<sup>4</sup>

The claim of the state for taxes is not suspended until the estate of a deceased person is administered, or bound to share with that of creditors in the distribution of the proceeds. The state may enforce it to the exclusion of all other creditors.<sup>5</sup>

Where the statute makes the tax due and payable at decedent's death, or at any definite time, the state is not bound to wait the final accounting of the executor.<sup>6</sup>

Again, as the collateral inheritance or succession tax is not always imposed upon the entire estate of the decedent,<sup>7</sup> but as a rule upon the specific taxable interest or property passing either by will or intestacy,<sup>8</sup> the proceeding to assess

way. This rule applies to all taxes, public and private. *Andover & M. Turnpike Corp. v. Gould*, 6 Mass. 40, 44.

<sup>3</sup> *U. S. v. Trucks' Adm'r*, *supra*; *Montague v. State*, 54 Md. 483; *Torrey v. Willard* (Sup.) 8 N. Y. Supp. 392.

<sup>4</sup> *United States Trust Co. v. Mayor, etc., of City of New York*, 77 Hun, 182, 28 N. Y. Supp. 344.

<sup>5</sup> *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Hil. Tax'n*, § 66.

<sup>6</sup> *In re Vassar*, 127 N. Y. 8, 27 N. E. 395.

<sup>7</sup> Under the laws of New York and Pennsylvania, the property taxable is the estate of the decedent, and not the share of the individual legatee. See *In re Hoffman's Estate*, 143 N. Y. 333, 38 N. E. 311; *In re Hall's Estate* (Sup.) 34 N. Y. Supp. 616. See chapter 3, § 41.

<sup>8</sup> See chapter 2, § 9; chapter 3, § 41.

and collect the tax, though, as we have seen, frequently involving a personal liability upon the part of the executor, administrator, trustee, or legatee, is more strictly analogous to an action in rem, as being against the taxable estate or share to satisfy the tax out of the specific property in the hands of the persons having the custody or possession thereof.

Such were the rulings under the succession acts of congress, and it was accordingly held that no personal liability existed upon the part of the executor as such,<sup>9</sup> though he would appear to have been so liable under the legacy act of congress.<sup>10</sup>

Hence, under the acts of congress mentioned, a common law remedy to recover the tax could not be maintained against the executors, the remedy afforded by the statute being solely to enforce the lien<sup>11</sup> against the beneficiary who took the legacy.

"The statute,"<sup>12</sup> says Butler, J.,<sup>13</sup> "provided a specific method for collecting the tax on legacies and successions. The tax was made a lien on all the decedent's property, and the administrator or executor directed to pay to the collector. In case he did not, the statute provided that the lien should be enforced by suit against anyone having possession, and the property be sold under the judgment. There is no provision for suit against the executor or administrator, 'and while such suit might be sustained for the failure to pay in the absence of express provision for enfor-

<sup>9</sup> U. S. v. Allen, 9 Ben. 154, Fed. Cas. No. 14,430, citing 12 Stat. 485, § 412; U. S. v. Trucks, *supra*; U. S. v. Pennsylvania Co., *supra*; U. S. v. Tappan, 10 Ben. 284, Fed. Cas. No. 16,431; *Sohier v. Eldridge*, 103 Mass. 345. Succession of Dupuy, 33 La. Ann. 258.

<sup>10</sup> U. S. v. Tappan, *supra*.

<sup>11</sup> U. S. v. Trucks, 27 Fed. 541; U. S. v. Pennsylvania Co., *Id.* 539. And see *Sohier v. Eldridge*, *supra*.

<sup>12</sup> Act June 30, 1864.

<sup>13</sup> U. S. v. Trucks, *supra*.

cing the lien under existing circumstances it cannot.' The direction is very specific. On the administrator's or executor's failure to pay, it provides that suit shall be brought against the individual in possession to enforce the lien. The remedy is an ample one, and there is nothing to support an implication that any other was contemplated, and no other remedy can be resorted to." But where there is a personal liability upon the executor or legatee and a right in rem against the property is also given, either remedy it would seem may be adopted. Under the Louisiana statute, where the property liable to the tax was sold in partition and the proceeds were in the hands of the executor ready for distribution, it was not necessary to bring direct proceedings against the property sold to recover the tax, but claim made in the partition proceedings was sufficient.<sup>14</sup>

In North Carolina the proper method of recovering the tax is by bill in equity in the nature of an information in the name of the attorney general,<sup>15</sup> and in Maryland, in addition to the liability of the executor, the state may maintain an action of assumpsit to recover the tax against a legatee to whom the executor has paid the legacy without deducting the tax therefrom.<sup>16</sup>

Under the English statutes, however, a strict liability in personam for the payment of the tax is imposed upon the

<sup>14</sup> Succession of Dupuy, *supra*.

<sup>15</sup> Attorney General v. Pierce, 6 Jones, Eq. 240. As to testing constitutionality of such statutes by injunction, see *Eyre v. Jacob*, 14 Grat. 424; by writ of prohibition to restrain the enforcement of the tax on the ground that the act is unconstitutional, see *Chambe v. Durfee* (1894) 100 Mich. 112, 58 N. W. 661. See, also, *Mearkle v. Hennepin Co.* (1890) 44 Minn. 546, 47 N. W. 165, by mandamus. *State v. Ferris*, 9 Ohio Cir. Ct. R. 299, affirmed 41 N. E. 579.

<sup>16</sup> *Montague v. State*, 54 Md. 483. See *Torrey v. Willard*, 55 Hun, 78, 8 N. Y. Supp. 392; *Seibert's Appeal* (Pa. Sup.) 6 Atl. 105; *In re Jones*, 5 Dem. Sur. 36.

executor, administrator, or trustee,<sup>17</sup> and where such persons fail to pay the duty they may be personally sued therefor as upon a debt due the crown.<sup>18</sup>

So, under the Pennsylvania statute, executors, administrators, or trustees are, for the purpose of the tax, deemed agents of the state.<sup>19</sup> and the proceeding to collect the tax is held to be something more than a proceeding in rem, as the register may by bill filed in the orphans' court compel payment from such personal representatives who have neglected to account for the tax and for the interest due thereon.<sup>20</sup>

Where tax accrues, and the executors or parties in possession neglect to pay the tax within a year after decedent's death, it is proper for the commonwealth to invoke the remedy provided by statute,<sup>21</sup> and to proceed, by bill or petition in the orphans' court, to enforce payment of the tax.<sup>22</sup>

Where the proper parties are brought before it, the orphans' court has the jurisdiction to compel parties liable to the tax to furnish the register of wills with all facts necessary for the assessment of the tax, and to enforce its payment when duly assessed.<sup>23</sup>

So, under the New York statute, the proceeding partakes both of the nature of a personal liability upon the part of

<sup>17</sup> See chapter 7, §§ 63, 64.

<sup>18</sup> *In re Sammon*, 3 Mees. & W. 381; *Bate v. Payne*, 13 Q. B. 900; *In re Wilkinson*, 1 Cromp., M. & R. 142; 15 & 16 Vict. c. 51, § 44; 36 Geo. III. c. 52, § 6; 13 & 14 Vict. c. 97, § 8.

<sup>19</sup> *Seibert's Appeal* (Pa. Sup.) 6 Atl. 105.

<sup>20</sup> Chapter 7, p. 362; *In re Cullen's Estate*, 26 Wkly. Notes Cas. 216; *James' Appeal*, 2 Deb. Co. Rep. 164; *Bank's Estate*, 5 Pa. Co. Ct. R. 616.

<sup>21</sup> Laws Pa. 1887, § 15.

<sup>22</sup> *In re Maris' Estate* (1893) 50 Leg. Int. 458, 14 Pa. Co. Ct. R. 171, and 3 Pa. Dist. R. 33.

<sup>23</sup> *In re Maris' Estate*, *supra*.



the executor<sup>24</sup> and of an action in rem against the property; and in that state the executor or administrator is held personally liable for the payment of the tax, where he has paid over the legacies without deduction, and for the costs of the proceeding to collect the tax.<sup>25</sup>

Such executor or administrator is also liable to contempt or attachment proceedings for the nonpayment of a tax directed to be paid by decree of the surrogate.<sup>26</sup>

Whether, in that state, the county treasurer or comptroller can maintain an action at law directly against the executor or administrator for taxes due, has not been determined;<sup>27</sup> but it would seem that the remedy which has been designated by the statute, to wit, through proceedings to be begun by the district attorney in the surrogate's court, would have to be followed.<sup>28</sup>

Under the act of 1892,<sup>29</sup> the county treasurer or comptroller may apply for the appointment of an appraiser to fix the value of the property; and, where application is made by others, notice must be given to the county treasurer.<sup>30</sup>

In England, where the executor or administrator has been compelled to pay the tax, he is afforded a remedy over

<sup>24</sup> Laws 1892, c. 399, §§ 3, 5.

<sup>25</sup> *In re Clark*, 1 Con. Sur. 431, 5 N. Y. Supp. 199; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Minturn's Estate*, 3 N. Y. Law J. 804.

<sup>26</sup> *In re Prout*, 3 N. Y. Supp. 831; Code Civ. Proc. 2555; *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *In re Gilman's Estate*, 6 Dem. Sur. 358; *In re Pelton's Estate*, 10 N. Y. Supp. 642; *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>27</sup> *In re Jones*, 5 Dem. Sur. 36; *Torrey v. Willard*, 8 N. Y. Supp. 392.

<sup>28</sup> But see *Montague v. State*, *supra*.

<sup>29</sup> Appendix, I. e, Laws 1892, c. 399, § 11.

<sup>30</sup> As to whether in proceedings by the district attorney he may be compelled to elect to hold the executor personally or the legatee, see *In re Cockey*, 8 N. Y. Law J. p. 1507.

against the legatee upon whose share the tax has been paid, as for money paid to the latter's use;<sup>31</sup> and the same remedy would seem to be given such personal representatives under our statutes, or at least at common law, as for money paid for the legatee's benefit under compulsion of law.<sup>32</sup>

Under none of the statutes, however, is there any personal liability on the part of the legatee or devisee, as such, to pay the tax, unless he actually or constructively accepts or receives the legacy or share, or any part thereof, in which event it is taken cum onere, subject to the payment of the duty.<sup>33</sup> In Louisiana the tax is held not to be a debt due by the succession in the state, but by the foreign heirs; hence it was necessary to bring suit directly against such heirs.<sup>34</sup>

But it will be a justification and a defense, on the part of the legatee, for refusing to pay, that he has absolutely renounced and refused to accept the inheritance or legacy.<sup>35</sup>

The fact that the legacy has not been paid, or its payment demanded, does not defeat the tax, where there is no proof that the legacy has been renounced.<sup>36</sup>

<sup>31</sup> *Foster v. Ley*, 2 Bing. N. C. 276. See, also, *Hales v. Freeman*, 1 Brod. & B. 391; *In re Sammon*, 3 Mees. & W. 381; *Bate v. Payne*, 13 Q. B. 900; *In re Wilkinson*, 1 Crompt., M. & R. 142; *Greville v. Greville*, 27 Beav. 596.

<sup>32</sup> See chapter 7, § 64; chapter 3, § 41.

<sup>33</sup> *Attorney General v. Munby*, 3 Hurl. & N. 826; *Foster v. Ley*, supra; *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *In re Howe*, 112 N. Y. 103, 19 N. E. 513; *In re Le Fever*, 5 Dem. Sur. 185; *In re Walsh*, N. Y. Law J. July 28, 1888; *In re Vanderbilt's Estate*, supra; chapter 7, §§ 63, 64; *Owings v. State*, 22 Md. 116.

<sup>34</sup> *Succession of Deyraud*, 9 Rob. (La.) 357; *Succession of Dupuy*, 33 La. Ann. 258.

<sup>35</sup> *In re McPherson*, supra; *In re Le Fever*, supra; *Attorney General v. Munby*, supra.

<sup>36</sup> *In re Raymond*, 12 N. Y. Law J. 453.

A constructive possession by the legatee is, however, sufficient to make him liable, as where he was awarded a certain sum in partition proceedings, and exercised acts of ownership over it.<sup>37</sup> And, where the devisee taking the property is liable to the succession tax, such liability is not defeated by the fact that in partition proceedings he has only had personal property assigned to him.<sup>38</sup>

A release or conveyance by a devisee who is a collateral heir, and taxable to one whose right of succession is not subject to the tax after the devise has once been vested, will not deprive the commonwealth of the tax.<sup>39</sup>

So an alien devisee of land, who receives its value in such proceedings, is estopped from setting up, as against a demand for a succession tax thereon, the fact that, by the law of the state where the land is situate, the devise to an alien is null and void.<sup>40</sup>

But there is no personal liability upon a purchaser of land at partition sale to pay the tax, where the tax is a lien upon the land itself,<sup>41</sup> and the statute does not authorize a sheriff who has sold land and collected the proceeds under the order of the court in such suit to pay the succession tax upon the descent of such lands.<sup>42</sup> Where, however, the purchaser of land upon which there is a tax due the state is compelled to pay the same to save the land from sale under

<sup>37</sup> *In re Walsh's Estate*, supra.

<sup>38</sup> *Scholey v. Rew*, 23 Wall. 331; *In re Walsh's Estate*, supra; *Brune v. Smith*, 13 Int. Rev. Rec. 54, Fed. Cas. No. 2,053. See *U. S. v. Watts*, 1 Bond, 581, Fed. Cas. No. 16,653; *Page v. Rives*, 1 Hughes, 297, Fed. Cas. No. 10,666.

<sup>39</sup> *In re Frank's Estate* (1891) 8 Law Rev. 384, 28 Wkly. Notes Cas. 323, and 48 Leg. Int. 232; 9 Pa. Co. Ct. R. 662.

<sup>40</sup> *Scholey v. Rew*, supra.

<sup>41</sup> See section 67, post, and *Wilhelmi v. Wade*, 65 Mo. 39; *Sohier v. Eldridge*, 103 Mass. 349.

<sup>42</sup> *Wilhelmi v. Wade*, supra.

execution for the tax, he may recover the amount from his vendors upon an implied covenant contained in the words "grant, bargain, and sell," in the deed.<sup>43</sup>

In New York, it seems, a certified receipt of the county treasurer or comptroller of the county where jurisdiction was first acquired will be full protection to any subsequent purchaser of such land, as against any claim for the tax.<sup>44</sup>

Where real estate passes to a person who is subject to the tax, the order of assessment must describe the same so that in issuing receipts the comptroller or county treasurer may designate on what real property said tax has been paid.<sup>45</sup>

The initial steps which the statute requires the surrogate to take are those of taxing officers, and not of judges. He appoints an appraiser to appraise the cash value of the property. Upon the coming in of the report he may enter an order determining the cash value of the estate. The order may be based upon the report, or upon any other proof before him, and this he does "as of course." But the party aggrieved may take an appeal from the order thus made to the surrogate and then, for the first time, the procedure takes on a judicial character.<sup>46</sup>

The surrogate's court in the latter state has exclusive original jurisdiction to hear and determine all questions arising in proceedings to collect the tax.<sup>47</sup>

<sup>43</sup> *Large v. McClain* (Pa. Sup.) 7 Atl. 101; *In re Boyd's Estate*, 4 Wkly. Notes Cas. 510. See *Kilderbee v. Ambrose*, 28 Eng. Law & Eq. 500.

<sup>44</sup> *In re Keenan* (Surr.) 5 N. Y. Supp. 200. See *In re Astor*, 6 Dem. Sur. 402.

<sup>45</sup> Laws 1887, c. 713, § 23; Laws 1892, c. 399, § 16; *In re Jones*, 7 N. Y. Law J. 578.

<sup>46</sup> *Weston v. Goodrich* (1895) 86 Hun. 194. 33 N. Y. Supp. 382.

<sup>47</sup> See chapter 7, § 62, pp. 350, 352; *In re McPherson*, 104 N. Y. 323, 324, 10 N. E. 685; *In re Keenan*, *supra*; *Anderson v. Anderson*, 112 N. Y. 104, 113, 19 N. E. 427; *Central Trust Co. v. New York City & N. R.*

And, the jurisdiction of the surrogate being exclusive, the supreme court of the state has no power, under these statutes, in an equity action, to adjudicate in the first instance upon the liability of an estate to the inheritance tax. Nor has a justice of said court any power to act as an assessor under said acts.<sup>48</sup>

Under a recent statute passed in 1895,<sup>49</sup> a limited power is now conferred upon justices of the supreme court to appoint an appraiser upon the application of the state comptroller, where the latter believes that a prior appraisement or determination in the surrogate's court was fraudulent, collusive, or erroneous. The application must be made to the justice within two years after the order of the surrogate is entered.

The proceeding to compel payment of the tax is commenced by petition filed by and in the name of the district attorney—who is required to prosecute the proceeding—in the surrogate's court of the county having jurisdiction over the estate,<sup>50</sup> and it seems that the only method by which the

Co., 47 Hun, 587; *Id.*, 110 N. Y. 250, 18 N. E. 92; *In re New York, L. E. & W. R. Co.*, 110 N. Y. 374, 18 N. E. 120; *U. S. v. Trucks*, 27 Fed. 541; *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156; *In re Ullmann*, 137 N. Y. 406, 33 N. E. 480; *Weston v. Goodrich*, 86 Hun, 194, 33 N. Y. Supp. 382.

<sup>48</sup> *Weston v. Goodrich* (1895) 86 Hun, 194, 33 N. Y. Supp. 382, citing *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156; *In re Ullmann*, 137 N. Y. 406, 33 N. E. 480.

<sup>49</sup> See Appendix, I. e, Laws 1895, c. 556, amending section 13, Laws 1892, c. 399.

<sup>50</sup> See chapter 7, p. 357; *In re Vanderbilt's Estate (Surr.)* 10 N. Y. Supp. 239; *In re Arnett*, 49 Hun, 599, 601, 2 N. Y. Supp. 428; *In re Farley's Estate*, 15 N. Y. St. Rep. 727. For forms under the New York statute, see Appendix, I.; *In re Astor's Estate (Surr.)* 2 N. Y. Supp. 630; 2 Lawy. Rep. Ann. 825, note. For a digest of cases under the statute, by Theo. Connolly, Esq., see 2 N. Y. Law J. (Dec. 24, 1889) 1760.

liability of the executor or others to pay the tax can be determined is by such a proceeding.<sup>51</sup>

The proceeding, under statutory requirement, is based upon a notice in writing from the county treasurer or comptroller to the district attorney, showing a "refusal or neglect" to pay the tax upon the part of the parties liable thereto. If, upon receipt of such notice, the district attorney shall have probable cause to believe a tax to be due, he shall thereupon initiate the proceedings to collect the tax. There is nothing in the statute requiring previous demand upon any of the parties liable for payment of the tax before the proceeding is begun.<sup>52</sup>

Under the Illinois statute<sup>53</sup> the proceeding to collect the tax is somewhat similar to the New York statute; the act providing that, if it shall appear to the county court that any tax accruing has not been paid according to law, it shall issue a summons, summoning the persons interested in the property liable to the tax to appear before the court on a day certain, not more than three months after the date of such summons, to show cause why said tax should not be paid. The process, practice, and pleadings, and the hearing and determination thereof, and the judgment in said court in such cases, shall be the same as those now provided, or which may hereafter be provided, in probate cases in the county courts of the state. It is further provided<sup>54</sup> that whenever the treasurer of any county shall

<sup>51</sup> Cases *supra*. But see *Frazer v. People* (Surr.) 3 N. Y. Supp. 134; *In re Astor's Estate*, *supra*. *In re Wolfe*, and cases *supra*.

<sup>52</sup> See Appendix, I. a, Laws 1887, c. 713, § 17; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239. Demand seems to have been necessary under the federal statute. See *U. S. v. Pennsylvania Co.*, 27 Fed. 539. What not a refusal to pay tax as regards costs of district attorney, see *Frazer v. People*, *supra*.

<sup>53</sup> Appendix, X., §§ 14, 15.

<sup>54</sup> Appendix, X. § 15.

have reason to believe that any tax is due and unpaid, after the refusal or neglect of the person interested in the property liable to pay said tax to pay the same, he shall notify the state's attorney of the proper county, in writing, of such refusal to pay said tax, and the state's attorney so notified, if he has proper cause to believe a tax is due and unpaid, shall prosecute the proceeding in the county court<sup>55</sup> for the enforcement and collection of such tax.

No demand is necessary where a statute provides that proceedings may be commenced upon a "neglect" or "refusal" to pay.<sup>56</sup>

While the district attorney is a proper party upon the final accounting of an executor, as being interested in the estate for the purpose of the tax, yet, in order to compel payment, he must institute the formal proceedings required by the statute, citing all necessary parties thereto.<sup>57</sup>

The executor, administrator, or trustee, or any other party interested<sup>58</sup> in the estate liable to the tax, may also, under the act, institute proceedings to have the property assessed or valued for the purpose of ascertaining the amount of the tax due.<sup>59</sup> The proceeding, however, for an appraiser, will be dismissed where no facts are stated, but only a conclusion of law that the estate is not liable.<sup>60</sup>

But it will be observed that this proceeding is of an entirely different nature from the one directed to be begun by the district attorney, which is, primarily, to compel

<sup>55</sup> See Appendix, X. § 14.

<sup>56</sup> *McLean v. Brown*, 5 N. Y. Law J. 407.

<sup>57</sup> Cases *supra*, and *In re Arnett*, 49 Hun, 599-601, 2 N. Y. Supp. 428; *In re Vanderbilt's Estate*, *supra*. See *In re Farley's Estate*, 15 N. Y. St. Rep. 727.

<sup>58</sup> As to meaning of this phrase, see *In re Wagner's Estate*, 119 N. Y. 32, 23 N. E. 200; *In re Arnett*, *supra*.

<sup>59</sup> Appendix, I. e, § 13; *Frazer v. People*, *supra*. See *In re Farley*, *supra*.

<sup>60</sup> *In re Cockey*, 8 N. Y. Law J. 1507.

payment of the tax from parties who have refused or neglected to pay the same.

It was held, under the act of 1887,<sup>61</sup> that the state was bound by a decree made in a proceeding begun by the executor under this provision of the statute, where no previous notice of the proceeding was given to the county treasurer or comptroller, the court holding that under the statute no such notice was either required or necessary; that the surrogate, in declaring an exemption from taxation, acted as a state assessor; and that his decree exempting the legatees was binding upon the state, without notice to any other state official.<sup>62</sup> Now, however, the act of 1892 \* requires the county treasurer or comptroller to be notified in the first instance of the proceeding for the appointment of an appraiser under the act.<sup>63</sup>

Though an estate subject to the tax had been appraised, and the surrogate had assessed the tax due thereon, and it had been paid, such proceeding does not bar a further proceeding to enforce the payment of the tax on property of the same estate not appraised in the former proceeding because withheld from the notice of the appraiser.<sup>64</sup>

Under the Pennsylvania statute,<sup>65</sup> the tax is imposed only on, "estates \* \* \* passing from any person who may

<sup>61</sup> Appendix, I. a.

<sup>62</sup> *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156, distinguished in *In re Smith's Estate* (Surr.) 23 N. Y. Supp. 762. See *In re Astor*, 6 Dem. Sur. 402. As to when the surrogate's decree is deemed conclusive, see Code Civ. Proc. N. Y. § 2473.

\* Chapter 399, §§ 11, 12.

<sup>63</sup> See *In re Vanderbilt's Estate*, supra; *In re McPherson*, 104 N. Y. 323, 10 N. E. 685; *Crane v. Mayor, etc.*, 13 N. Y. St. Rep. 342; *Lockwood v. Carr*, 4 Dem. Sur. 515; *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721; *Succession of Dupuy*, 33 La. Ann. 261.

<sup>64</sup> *In re Smith's Estate* (1893; Surr.) 23 N. Y. Supp. 762, distinguishing *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156.

<sup>65</sup> Act May 6, 1887, p. 79.



die seized or possessed of such estates." It is upon the state to show, not only that the persons against whom it claims taxes are not of the exempted classes, but that the estate passed from one who actually died seized or possessed of the same. Therefore, where property was settled by will to one in trust for life, and upon the determination of the life estate to the "right heirs" of the testator, and upon the death of the life tenant in trust it becomes established that the life tenant was entitled as the "right heir," the estate was awarded to the distributees under the will of the deceased life tenant, free of the tax upon her estate.<sup>66</sup>

Ex parte orders or decrees relieving persons from the tax are not, therefore, binding upon the county treasurer or comptroller, and are no bar to proceedings begun by them to collect the tax.<sup>67</sup> As a general rule, it is doubtful whether anything will bar the claim of the state, excepting payment of the tax, or a decree of a competent court having jurisdiction in the premises. Even a receipt for payment of the tax will not act as an estoppel against the state to recover a tax or interest due, where the receipt was simply for the amount of tax fixed by the court, and does not express the idea that the money was received in satisfaction, discharge, or payment of the amount of the tax claimed by the state.<sup>68</sup> And a receipt is no bar to proceedings to collect taxes which, by mistake or fraud, were omitted to be paid.<sup>69</sup>

<sup>66</sup> *In re Swann's Estate*, 147 Pa. St. 383, 23 Atl. 599.

<sup>67</sup> *Id.*; *In re Lenox's Estate* (Surr.) 9 N. Y. Supp. 895; *In re Hochster*, cited *Id.* 896.

<sup>68</sup> *Commonwealth's Appeal* (Fagely's Estate) 128 Pa. St. 613, 18 Atl. 386. See *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; *In re Astor*, *supra*; *Commonwealth's Appeal* (Bittinger's Estate) 129 Pa. St. 338, 18 Atl. 132; *Com. v. Freedley*, 21 Pa. St. 33; *In re Brewer's Estate*, 16 Pittsb. Leg. J. (N. S.) 114; 15 Pittsb. Leg. J. (N. S.) 435; *Smith's Estate*, *supra*.

<sup>69</sup> *Id.* and *In re Brewer's Estate*, *supra*. As to effect of receipt upon

In fact, whether the proceeding is one begun by the state through its designated officials, or by the persons interested in the estate, all parties under the statute, interested in the property, as heirs, legatees, or public officials, are entitled to notice<sup>70</sup> and hearing, as without these the proceeding, as to them, will be void.<sup>71</sup> As we have seen under the act of 1892,<sup>72</sup> the county treasurer or comptroller is also entitled to be notified of the proceeding.

The rights of the parties to this proceeding under the New York statute have been aptly described by Earl, J., in *Re McPherson*:<sup>73</sup> "Upon return of the citation, the person cited may allege any reason whatever which shows that he ought not to pay the tax. He may answer that he has not had an opportunity to be heard upon the appraisal, and that, therefore, the tax, as to him, is void. He may show any error affecting the validity of the tax, and that he has never received, and never will receive, the inheritance or legacy; and it would be a justification for refusing to pay, that he had absolutely renounced and refused to accept or receive the inheritance or legacy. \* \* \* When the section provides that the surrogate shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all persons entitled to notice. If he should omit to do so, it would be an error on account of which any tax imposed upon the person not notified or heard, would be invalid, as having been imposed without jurisdiction."

proceedings of the district attorney, where there is property in different counties liable to the tax see *In re Keenan's Estate* (Surr.) 5 N. Y. Supp. 200.

<sup>70</sup> Orders appointing appraisers should specify persons entitled to notice. *In re Astor*, 6 Dem. Sur. 402; *In re McPherson*, 104 N. Y. 322, 10 N. E. 685.

<sup>71</sup> Cases *supra*, and *In re Miller's Estate*, 110 N. Y. 216, 224, 18 N. E. 139; *In re Arnett*, 49 Hun, 602, 2 N. Y. Supp. 428.

<sup>72</sup> Appendix, I. e, Laws 1892, c. 399, § 11.

<sup>73</sup> 104 N. Y. 323, 10 N. E. 685.

The doctrine of notice is one which finds application when it is sought to tax the property of the citizen. When he is to be assessed, it is essential that he shall be given an opportunity to be heard, to establish a demand against him.<sup>74</sup>

And under the act of 1892, where infants are interested in the estate, they are entitled to be notified of the assessment proceeding, and to have special guardians appointed to represent their interests.<sup>75</sup>

In a proceeding, however, to vacate the assessment for being without notice, it will be presumed, in the absence of proof to the contrary, that the surrogate gave the notice required by statute.<sup>76</sup>

Under the statute it would seem that the surrogate has the power to order a reference for the purpose of determining any doubtful or disputed question of fact, and he may take all necessary testimony<sup>77</sup> in relation thereto.

As to the effect of his decree, it is confirmatory of the rights of the state, where made upon proper notice, and establishes an additional right,—that of recovery, by virtue of itself;<sup>78</sup> and such decree cannot be vacated, as having been made inadvertently, upon a motion based upon a change in the law effected by a statute passed after the rendering of the decree, and before payment of the tax.<sup>79</sup> An order imposing the tax will not be modified or amended by motion, the remedy being by appeal.<sup>80</sup>

<sup>74</sup> *In re Wolfe*, 137 N. Y. 205, 33 N. E. 156; *In re Cockey*, 8 N. Y. Law J. 1507.

<sup>75</sup> *In re Lewis*, 7 N. Y. Law J. 951, citing *In re McPherson*, 104 N. Y. 306, 10 N. E. 685.

<sup>76</sup> *Estate of Miller*, 110 N. Y. 216, 18 N. E. 139.

<sup>77</sup> Code Civ. Proc. § 2546; see *In re Pearsall*, 51 Hun, 639, 4 N. Y. Supp. 365; *In re Prout's Estate* (Surr.) 3 N. Y. Supp. 831; *In re Astor's Estate* (Surr.) 2 N. Y. Supp. 630; *In re McPherson*, *supra*.

<sup>78</sup> *In re Miller*, 6 Dem. Sur. 119, 110 N. Y. 216, 18 N. E. 139.

<sup>79</sup> *Id.*; see chapter 3, § 33.

<sup>80</sup> *In re Ferrer*, N. Y. Law J. (Jan. 30, 1892) 1062.

Under these statutes, parties aggrieved by the imposition of the tax are afforded a remedy by appeal,<sup>81</sup> and the state is afforded the same remedy where it is aggrieved by any error of the court in refusing to assess or impose the tax as required by law. Some of the questions relating to appeals from proceedings before the appraiser have already been considered.<sup>82</sup>

After the time to appeal has expired, an order imposing the tax will not be amended or modified by the surrogate.<sup>83</sup>

Upon appeal to the surrogate from an assessment of the tax, security should be given to pay the tax and costs imposed.<sup>84</sup>

Under the recent act of 1892,<sup>85</sup> it would seem that any successful party to the proceeding is entitled to costs, the same as in other actions.<sup>86</sup>

<sup>81</sup> *In re McPherson*, 104 N. Y. 323, 10 N. E. 685. As to power of United States supreme court to review decisions of state court under these statutes, see *Carpenter v. Penn.* 17 How. 456, 462.

<sup>82</sup> Chapter 5, § 55. As to whether, in New York, under these proceedings, the surrogate can be reviewed on appeal without findings of fact and conclusions of law has not been determined. The proceedings are of a summary nature, the appraiser, in ascertaining the value of the property, receives all proof bearing upon the subject (see chapter 5, p. 209), and as additional proof will be received by the surrogate upon motion to confirm the appraiser's report, findings would seem to be wholly foreign to a proceeding of this nature. Consult, however, *In re Fall's Estate* (Sup.) 10 N. Y. Supp. 41, and cases cited Code Civ. Proc. N. Y. § 2545.

<sup>83</sup> *In re Ferrer*, N. Y. Law J. (Jan. 30, 1892) 1062.

<sup>84</sup> Appendix, I. e, Laws N. Y. 1892, c. 399, § 13; *In re Phelp's Estate*, N. Y. Law J. Jan. 23, 1890. As to costs of district attorney under the statute of 1887, see *In re Stucke*, N. Y. Daily Reg. April 25, 1889; *Frazer v. People* (Surr.) 3 N. Y. Supp. 134; *In re Min-turn's Estate*, 3 N. Y. Law J. 804. As to costs of district attorney under the act of 1892, c. 399, § 15, see *In re McCarthy's Estate* (Surr.) 25 N. Y. Supp. 987.

<sup>85</sup> Chapter 399, § 15.

<sup>86</sup> *In re Hoffman*, N. Y. Law J. Nov. 17, 1893.

In Pennsylvania, where the tax is imposed upon real estate, the heir, and not the administrator, is given the right of appeal from the appraiser's report; but, upon questions relating to the appraisement<sup>87</sup> of the personalty, the administrator only has the right of appeal,<sup>88</sup> and, unless the report of the appraiser shows *prima facie* error, no appeal can be taken therefrom.<sup>89</sup>

The general rule is that a tax voluntarily paid under a mistake of law cannot be recovered back.<sup>90</sup>

Many of the statutes imposing this tax provide for restitution where the tax is erroneously paid.<sup>91</sup>

In New York, under the act of 1887,<sup>92</sup> application for restitution of taxes paid erroneously must be made to the state treasurer, on satisfactory proof rendered to the state comptroller by the county treasurer or county comptroller of such erroneous payment, and the application should be made within five years from the date of the payment. In this respect the method pointed out by the statute is exclusive of any other remedy.<sup>93</sup>

Under the act of 1892,<sup>94</sup> it is now provided that it shall be lawful for the comptroller of the state, upon satisfactory proof presented to him of the facts, to require the amount of such illegal or erroneous payment to be refunded to the

<sup>87</sup> See chapter 5, § 54, subd. c.

<sup>88</sup> *Com. v. Coleman*, 52 Pa. St. 468.

<sup>89</sup> *In re Goldstein's Estate*, 16 Phila. 319.

<sup>90</sup> *People v. Wemple*, 69 Hun, 367, 23 N. Y. Supp. 661, 664; 133 N. Y. 617, 30 N. E. 1002.

<sup>91</sup> See chapter 4, § 49.

<sup>92</sup> Appendix, I. a, e, c. 713, § 12; Laws 1892, c. 399, § 6. Redf. *Surr. Prac.* (4th Ed.) p. 586, considers this section incapable of enforcement under Const. N. Y. art. 7, § 8.

<sup>93</sup> *In re Howard*, 54 Hun, 305, 7 N. Y. Supp. 594; *Dewey v. Supervisors*, 62 N. Y. 294. See, also, *In re Hall's Estate* (Sup.) 7 N. Y. Supp. 595; *In re Keech* (Surr.) 7 N. Y. Supp. 331, affirmed, *Id.* (Sup.) 11 N. Y. Supp. 265.

<sup>94</sup> Laws 1892, c. 399, § 6.

executor, administrator, trustee, person, or persons who have paid any such tax in error, from the treasury; or the said comptroller may, by order, direct and allow the treasurer of any county, or the comptroller of the city of New York, to refund the amount of any illegal or erroneous payment of such tax out of the funds in his hands or custody to the credit of such taxes, and credit himself with the same in his quarterly account rendered to the state comptroller. Applications for refunding must, as under the act of 1887, be made within five years from the payment of the tax. Under this act<sup>95</sup> the surrogate has power to direct the tax to be refunded while it is still in the hands of the county treasurer.<sup>96</sup>

But the question of restitution does not properly arise upon a mere appeal from the order assessing and fixing the tax, taken after the payment of the tax, to which appeal neither the comptroller nor the state treasurer is made a party.<sup>97</sup>

Where a tax is paid under protest and the law is subsequently declared unconstitutional, such tax may be recovered back.<sup>98</sup>

A writ of prohibition will lie against a probate judge, to restrain the enforcement of a collateral inheritance tax upon the ground that it is unconstitutional.<sup>99</sup>

<sup>95</sup> Laws 1892, c. 399, § 10.

<sup>96</sup> *In re Parks' Estate*, 8 Misc. Rep. 550, 29 N. Y. Supp. 1081.

<sup>97</sup> *In re Hall*, *supra*. For return of duty under English statutes, see Layton, *Leg. & Succ. Duties* (7th Ed.) p. 236 et seq.

<sup>98</sup> *Mearkle v. Hennepin Co.*, 44 Minn. 546, 47 N. W. 165; *Cooley, Tax'n*, 566, and cases cited.

<sup>99</sup> *Chambe v. Durfee* (1894) 100 Mich. 112, 58 N. W. 661.

### § 67. Lien of the Tax and Its Effect—Statute of Limitations.

A lien is not, in strictness, either a *jus in rem*, or a *jus ad rem*; but it is simply a right to retain and possess property until some charge attaching to it has been paid or discharged.<sup>100</sup> As a general rule taxes do not become liens upon the property subject to taxation until they have been assessed in the manner required by statute,<sup>101</sup> unless especially declared to be liens, when they are termed statutory liens, and by force of the statute immediately impress themselves as a liability upon the property.<sup>102</sup> Under these statutes, the tax is generally made a lien upon real estate and sometimes upon personal property.

Under the English acts a very comprehensive lien is provided for upon real property,<sup>103</sup> the rights of bona fide purchasers without notice being at the same time protected;<sup>104</sup> and, to a certain extent, personal property liable to the tax is also subjected to a lien to secure its payment.<sup>105</sup>

Under the New York statutes<sup>106</sup> the tax remains a gen-

<sup>100</sup> 1 Story, Eq. Jur. § 506.

<sup>101</sup> *Lathers v. Keogh*, 109 N. Y. 583, 17 N. E. 131; *Dowdney v. Mayor*, etc., 54 N. Y. 186.

<sup>102</sup> *Heine v. Commissioners*, 19 Wall. 655; *Tompkins v. Little Rock & Ft. S. R. Co.*, 125 U. S. 119, 8 Sup. Ct. 762; *Id.*, 18 Fed. 344.

<sup>103</sup> 16 & 17 Vict. c. 51, § 42; see *Attorney General v. Giles*, 5 Hurl. & N. 255.

<sup>104</sup> 16 & 17 Vict. c. 51, § 52.

<sup>105</sup> As to when the purchaser of real estate under agreement to buy free from incumbrances is liable to pay succession duty as between himself and the vendor, see *Cooper v. Trewby*, 28 Beav. 194; *In re Langham*, 60 Law J. Ch. 110; *Dugdale v. Meadows*, L. R. 9 Eq. 212.

<sup>106</sup> Laws 1887, § 2. See, also, Laws 1892, c. 399, §§ 3, 5, Appendix, I. a, e.

eral lien until it is paid. It also remains a charge upon the real estate until paid.<sup>107</sup> The same provisions are contained in the act of 1892,<sup>108</sup> and there is no limitation of time in favor of executors or legatees against the tax as a penalty or forfeiture under the Civil Code.<sup>109</sup>

A certified copy of the county treasurer's receipt showing payment of the tax will be full protection to bona fide purchasers<sup>110</sup> against any future claim. As a general rule, a statute of limitations will not bind the state unless it has expressly consented to be bound.<sup>111</sup>

Under the Illinois statute<sup>112</sup> the lien of the collateral inheritance tax continues until the tax is settled and satisfied, but said lien is limited to the property chargeable therewith, and all inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they are presumed to be paid, and cease to be a lien as against purchasers of real estate.

The present statute of Pennsylvania,<sup>113</sup> provides for a statutory lien of five years upon real estate, but after that time the lien is presumed to be paid as against purchasers of such real estate.<sup>114</sup>

Under the original act of 1826, the tax became a lien from the time of the death of decedent, when the tax ac-

<sup>107</sup> Laws 1892, c. 399, § 6, Appendix, I. e.

<sup>108</sup> *Id.*

<sup>109</sup> *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239; citing Code Civ. Proc. § 384, providing that "an action upon a statute for a forfeiture or penalty to the people of the state" must be brought within two years after the cause of action accrues.

<sup>110</sup> *In re Keenan's Estate* (Surr.) 5 N. Y. Supp. 200; *In re Astor's Estate* (Surr.) 2 N. Y. Supp. 630.

<sup>111</sup> *Cullen's Estate* (1891) 142 Pa. St. 18, 21 Atl. 781.

<sup>112</sup> Appendix, X., Laws Ill. 1895 (Bradwell's Ed.) p. 217, § 22.

<sup>113</sup> Appendix, X., Laws 1887, §§ 7, 20.

<sup>114</sup> Appendix, X., Laws 1887, § 12.



crued, and so remained until fully paid.<sup>115</sup> Subsequently, by act of 1855, it was limited to 20 years.<sup>116</sup>

The tax or lien, however, under these statutes, only attaches to what remains for distribution after the expense of administration, debts, and rightful claims of third parties are provided for. It attaches upon the net succession to the beneficiaries, and not upon the securities or land in which the estate of the deceased may be invested.<sup>117</sup>

The lien of the tax is, however, perpetual against owners, devisees, or legatees, and the limitation in the acts applies only to the purchasers of such real estate.<sup>118</sup>

The proviso of the statute was simply intended to quiet the title of purchasers of real estate, and that is the extent of its operation. Where there is no purchaser to protect, the lien of taxes due upon real estate, as well as the debt itself, will continue after five years, notwithstanding that suit is not brought within that time.<sup>119</sup>

Where a debt is barred by the statute of limitations, and is subsequently recognized by the decedent as a valid claim, in the shape of a legacy for the amount, it is not liable to duty.<sup>120</sup> The commonwealth is not barred from collecting

<sup>115</sup> *Com. v. Coleman*, 52 Pa. St. 470.

<sup>116</sup> *Mellon's Appeal*, 114 Pa. St. 564, 8 Atl. 183.

<sup>117</sup> See cases cited chapter 5, §§ 52, 55; *Orcutt's Appeal*, 97 Pa. St. 179; *Commissioner's Appeal (Avery's Estate)* 34 Pa. St. 204; *Strode v. Com.*, 52 Pa. St. 181; *In re Rubineam's Estate*, 38 Leg. Int. 261; *Commissioner's Appeal (Cooper's Estate)* 127 Pa. St. 435, 17 Atl. 1094, affirming *Cooper v. Com.*, 5 Pa. Co. Ct. R. 271; *Cullen's Estate*, *supra*; *In re Will of Enston*, 113 N. Y. 181, 21 N. E. 87; *Mellon's Appeal*, *supra*.

<sup>118</sup> *Cullen's Estate*, 26 Wkly. Notes Cas. 216, 142 Pa. St. 18, 21 Atl. 781; *James' Appeal*, 2 Del. Co. Rep. 164; *Mellon's Appeal*, *supra*; *In re Butler's Estate* (1894) 14 Pa. Co. Ct. R. 667.

<sup>119</sup> *In re Cullen's Estate* (1891) 142 Pa. St. 18, 21 Atl. 781.

<sup>120</sup> *Williamson v. Naylor*, 3 Younge & C. Exch. 208. See chapter 8, § 67.

the inheritance tax by proceedings begun more than five years after the passage of the act of 1887,<sup>121</sup> where prior to that act the widow bought the estate in remainder from collateral heirs.<sup>122</sup>

After 42 years, collateral inheritance tax will be presumed to have been paid, not only on the ground of lapse of time, but also from the presumption that the executor did his duty under his oath of office.<sup>123</sup>

One of the most interesting cases upon the subject of the lien is that of Mellon's Appeal,<sup>124</sup> in which the supreme court of Pennsylvania decided two important questions: First, as to the effect of the failure on the part of the state to prosecute the lien created in its favor, as against a bona fide purchaser without notice, within 20 years after the tax accrued; and, secondly, the effect of such neglect upon collateral heirs still possessing the property. The facts showed that in 1849 the wife of one B. died intestate, seised of certain lands, leaving as her only heirs her husband and three minor children. Under the statute the land descended to the children, subject to the father's life estate. In 1864 the eldest daughter died intestate, without issue, and unmarried, and subject to the life estate, and charged with the tax her third interest devolved upon her brother and sister. There was no administration of her estate. In 1866 the father, as guardian of the two children, sold three acres of the land; and in 1870, at maturity, the children conveyed four acres to their father, B., he releasing his life estate in the residue of the property. He died in 1872, devising the land to children by a second marriage. The share of one child was sold in partition to Mellon, and the other child sold part

<sup>121</sup> May 6, 1887.

<sup>122</sup> *Butler's Estate* (1894) 14 Pa. Co. Ct. R. 667.

<sup>123</sup> *In re Stewart's Estate* (Bell's Appeal; 1892) 147 Pa. St. 383, 23 Atl. 599.

<sup>124</sup> 114 Pa. St. 564, 8 Atl. 183.

of her share, retaining a portion. In holding that the action could not be maintained by the state, the court said: <sup>125</sup> "If the tax accrued at the time of Mrs. B.'s decease, in 1864, by the devolution of her undivided interest in the land, and the commonwealth might have proceeded at any time thereafter to have the same appraised, and the amount of tax ascertained, with a view of its ultimate collection, the lapse of twenty years without any steps having been taken in that direction raises a conclusive presumption of payment as to bona fide purchasers from those to whom the remainder in fee descended, and the lien theretofore existing in favor of the commonwealth forthwith ceased, as to such purchasers."

It was further held that the fact that no administration was had upon the estate liable to the tax, for which reason the matter was not brought to the attention of the register, did not operate to remove the bar, and that as to the portion of the estate unsold, subject to the tax, it must be deemed to have been constructively paid, by the fact that the money realized from judicial sales of the interest bound by the lien was sufficient to have paid the tax; and the court said: "If the claim had been made, the court would doubtless have retained its grasp on a sufficient amount of the funds to pay the tax lien, but no claim upon the fund was ever made. \* \* \* That fact did not, however, prevent the discharge of the lien by judicial sales producing funds applicable primarily to the lien, and more than sufficient to pay it." <sup>126</sup>

Thus the lien of the tax upon real estate was held to be divested by the sheriff's sale in partition.

And where the purchaser of land upon which there was a lien for unpaid taxes due the state was compelled to pay the same, to save the land from sale under execution, he was

<sup>125</sup> Page 569, 114 Pa. St., and page 183, 8 Atl.

<sup>126</sup> Mellon's Appeal, *supra*. See Martin's Estate, 19 Pa. Law J. (N. S.) 145; Willing's Estate, 33 Leg. Int. 54, 2 Wkly. Notes Cas. 307, 308;

allowed to recover the amount paid from his vendors, upon an implied covenant in the deed of sale.<sup>127</sup>

The acts of congress subjected the property liable to the tax to liens, and specified the method of enforcing payment, but, as we have seen,<sup>128</sup> they did not create a personal liability on the part of the legatee, unless he received the taxable interest or property, and in order to enforce the lien there must have been a neglect or refusal to pay the tax by the person having the property, after demand made.<sup>129</sup> The duty became a lien from the time the tax became due and payable.<sup>130</sup> After 20 years the tax was presumed to be paid, and the lien ceased.<sup>131</sup>

So purchasers of land upon the descent of which a succession tax is due under these acts<sup>132</sup> incur no personal liability to pay it, but take the title subject to the lien; and it seems a party is not liable for payment of the tax due upon the descent of the land, greater than his share in the land.<sup>133</sup>

Where the land which is subject to the tax has been sold in parcels successively, the last sold, if of sufficient value,

*Wilhelmi v. Wade*, 65 Mo. 39; *Succession of Dupuy*, 33 La. Ann. 260; *In re Keenan's Estate* (Surr.) 5 N. Y. Supp. 200. See, also, *Kortright v. Blunt*, 12 How. Prac. 424, reversed on another ground, 21 N. Y. 343; *Daly v. Sanders*, 9 N. Y. St. Rep. 794.

<sup>127</sup> *Large v. McClain* (Pa. Sup.) 7 Atl. 101. See *Boyd's Estate*, 4 Wkly. Notes Cas. 510.

<sup>128</sup> *Supra*, p. 388.

<sup>129</sup> *U. S. v. Pennsylvania Co.*, 27 Fed. 539; *U. S. v. Trucks*, Id. 541; *Sohier v. Eldridge*, 103 Mass. 349; *Wilhelmi v. Wade*, *supra*.

<sup>130</sup> *Clapp v. Mason*, 94 U. S. 592; *U. S. v. Allen*, Fed. Cas. No. 14,430; *U. S. v. Hazard*, 8 Fed. 380.

<sup>131</sup> *Mason v. Sargent*, 104 U. S. 690. As to when action to recover back penalty illegally exacted upon succession tax is not barred, see *Wright v. Blakeslee*, 101 U. S. 174.

<sup>132</sup> 1 *Brightly*, *Purd. Dig.* (12th Ed.) p. 308, § 25.

<sup>133</sup> *Wilhelmi v. Wade*, *supra*; *Succession of Dupuy*, 33 La. Ann. 260. But see *Large v. McClain*, *supra*.

is liable for the whole tax, notwithstanding that the first sold at judicial sale was sufficient to have paid the tax. The last lot sold stands in relation of principal to the first,<sup>134</sup> and, where there are several tracts of land of a decedent to be valued for the tax, the tracts should be valued separately, and as occupied by the tenants.<sup>135</sup>

### § 68. Interest and Penalties for Nonpayment of Tax.

These acts frequently impose interest from the time the tax accrues, which is generally at decedent's death, until its final payment, and also penalties for nonpayment of the tax when due. Ordinarily, a tax does not carry interest by implication of law,<sup>136</sup> as in the case of a debt; and in all systems of taxation, where default is made in the payment of the tax, interest is added by way of penalty for such default.<sup>137</sup>

Statutes imposing penalties are to be strictly construed against the claim.<sup>138</sup>

As a rule, suits to recover penalties under statutes of this character cannot be enforced in foreign states or countries.<sup>139</sup>

<sup>134</sup> *Martin's Estate*, 19 Pittsb. Leg. J. (N. S.) 145, 28 Atl. 575, distinguishing *Mellon's Appeal*, 114 Pa. St. 564, 8 Atl. 183.

<sup>135</sup> *McKean's Estate*, 12 Pittsb. Leg. J. (N. S.) 299. But see *In re Keenan's Estate* (Surr.) 5 N. Y. Supp. 200.

<sup>136</sup> *Cooley, Tax'n* (2d Ed.) p. 17; *Hil. Tax'n*, p. 16.

<sup>137</sup> *In re Prout's Estate*, 53 Hun, 543, 6 N. Y. Supp. 457; *Brewer's Estate*, 16 Pittsb. Leg. J. (N. S.) 114; *Banks' Estate*, 5 Pa. Co. Ct. R. 615.

<sup>138</sup> *In re Prout's Estate*, supra, affirmed 117 N. Y. 650, 22 N. E. 1132. And see *Chase v. Railroad Co.*, 26 N. Y. 525; *Sprinkle v. Com.*, 2 Walk. (Pa.) 420.

<sup>139</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370. As to when a nonresident's estate is not liable for penalty, *In re Purroy*, 7 N. Y. Law J. 344.

Under the Pennsylvania acts of 1849 and 1855, if the tax, which was imposed upon all estates, including remainders, was not paid within nine months after decedent's death, it carried a penalty of 12 per cent. from the date of death.<sup>140</sup>

Under the act of 1887, the interest on taxes for which tenant in remainder is liable begins to run only from the time such tenant has the right of actual possession or enjoyment.<sup>141</sup>

Where the failure to pay inheritance tax promptly is caused by an honest doubt, as to the liability (i. e. whether life tenant or tenant in remainder is liable), the penalty for nonpayment should not be exacted.<sup>142</sup>

Where there is unavoidable delay in the settlement of decedent's estate, the 12 per cent. penalty is not chargeable, but interest from the end of the year should be added.<sup>143</sup>

Where the delay in payment of the tax was caused by the resistance of the executors and legatees to the commonwealth's claim, and the case was decided adversely to the

<sup>140</sup> *Com. v. Smith*, 20 Pa. St. 100; *Commonwealth's Appeal (Avery's Estate)* 34 Pa. St. 204; *In re McKean's Estate*, 12 Pittsb. Leg. J. (N. S.) 299, 300; *James' Appeal*, 2 Del. Co. R. 164; *Com. v. Bausman*, 10 Lanc. Bar (Pa.) 189. The act of 1855, substituting 6 per cent. annual charge for the 12 per cent. penalty, is not inconsistent with the act of 1887. *Commonwealth's Appeal (Fagely's Estate)* 128 Pa. St. 612, 18 Atl. 386; *In re Banks' Estate*, 5 Pa. Co. Ct. R. 614. See these acts considered and explained as to the rate of interest, *Mellon's Appeal*, 114 Pa. St. 570, 573, 8 Atl. 183; *In re Del Busto's Estate*, 45 Leg. Int. 474; 23 Wkly. Notes Cas. 111; *Commonwealth's Appeal (Cooper's Estate)* 127 Pa. St. 435, 17 Atl. 1096.

<sup>141</sup> *Commonwealth's Appeal (Cooper's Estate)* supra. And see *In re Wharton's Estate*, 10 Wkly. Notes Cas. 106; *In re King's Estate*, 11 Phila. 26; *In re Brewer's Estate*, 16 Pittsb. Leg. J. (N. S.) 114.

<sup>142</sup> *Sprankle v. Com.* (1884) 2 Walk. (Pa.) 420, citing *Com. v. Eber-vale Coal Co.*, 2 Fears. (Pa.) 421; *Easton Bank v. Com.*, 10 Pa. St. 451. But see *In re Platt's Estate* (Surr.; 1894) 29 N. Y. Supp. 396.

<sup>143</sup> *Commonwealth's Appeal* (1889) 128 Pa. St. 603, 18 Atl. 386.

executors, the judgment bears interest from the expiration of one year after the date of decedent's death.<sup>144</sup>

Litigation to toll the liability of an estate for penalty for nonpayment of the tax, after the expiration of the year, must be such as withholds the real and personal estate from the parties entitled thereto.<sup>145</sup>

A controversy between rival claimants under a deed and will will not toll the penalty, nor does litigation among the distributees toll the penalty.<sup>146</sup>

Where, under these statutes, there has been "an unavoidable cause of delay" or necessary litigation in the settlement of the estate, the penalty for delay in payment of the tax cannot be imposed, but in such cases only 6 per cent. interest is recoverable on the tax from the end of the year succeeding decedent's death;<sup>147</sup> and by the New York statute<sup>148</sup> the penalty of 10 per cent. imposed for the nonpayment of the tax is likewise not chargeable in such cases.

Under the act of 1887,<sup>149</sup> no interest or penalty was chargeable during the first 18 months after decedent's death. From that time to the entry of the order fixing the tax,

<sup>144</sup> *In re Small's Estate* (1892) 151 Pa. St. 1, 25 Atl. 23.

<sup>145</sup> *In re Small's Estate*, *supra*.

<sup>146</sup> *In re Maris' Estate* (1893) 50 Leg. Int. 458; 14 Pa. Co. Ct. R. 171; 3 Pa. Dist. R. 33.

<sup>147</sup> *Commonwealth's Appeal (Fagely's Estate)* *supra*; *In re Banks' Estate*, *supra*; *In re McKean's Estate*, 12 Pittsb. Leg. J. (N. S.) 299, 300; *Mellon's Appeal*, *supra*; *Com. v. Bausman*, 10 Lanc. Bar (Pa.) 189; *Commonwealth's Appeal (Avery's Estate)* 34 Pa. St. 204; *In re Prout's Estate*, 53 Hun, 541, 6 N. Y. Supp. 457; *Id.*, 117 N. Y. 650, 22 N. E. 1132; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184. As to rate of penalty under acts of congress, and when actions to recover back penalty erroneously paid is not barred by statute of limitation, see *Wright v. Blakeslee*, 101 U. S. 174.

<sup>148</sup> Appendix, I. a., Laws 1887, §§ 4, 5. See these provisions explained per Van Brunt, P. J., *In re Prout's Estate*, *supra*; *In re Vassar*, 127 N. Y. 8, 27 N. E. 394.

<sup>149</sup> Laws N. Y. 1887, c. 713, § 4.

interest at the rate of 6 per cent. is chargeable, and thereafter the penalty of 10 per cent. is imposed.<sup>150</sup>

Under the New York act of 1892,<sup>151</sup> if the tax is paid within six months from the accruing thereof, a discount of 5 per cent. is allowed and deducted. If the tax is not paid within 18 months from the accruing thereof, interest shall be charged and collected thereon at the rate of 10 per cent. per annum from the time the tax accrued, unless, by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, such tax cannot be determined and paid, in which case interest at the rate of 6 per cent. per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which 10 per cent. shall be charged.

The burden, however, under this clause of the statute, rests upon the party claiming exemption from penalty to show that he comes within the provisions of the act, namely, that the settlement of the estate has been delayed by necessary litigation, or other unavoidable cause, and that, therefore, he is not in a condition to settle the estate, or to pay the tax.<sup>152</sup>

Where decedent's estate largely consisted in business enterprises in partnership with others, and the executor did not receive the proceeds of these investments, but they went to swell the corpus of the estate until final settlement, and the transactions were so complicated that it was unsafe for the executor to estimate what amount would be subject to the tax, and the appraisers themselves reduced their first report of the taxable value by a large amount, it was held that there was "unavoidable cause" of delay for failing to make the estimate within a year after decedent's death, and

<sup>150</sup> See *In re Roosevelt*, 9 N. Y. Law J. 128; citing *In re Prout's Estate*, supra. See *In re Halsey*, Id. 532.

<sup>151</sup> Appendix, I. e., § 4.

<sup>152</sup> *In re Prout's Estate*, 53 Hun, 544, 6 N. Y. Supp. 457.



that the penalty could not be exacted, though such delay continued 13 years.<sup>153</sup>

But the fact that the parties were foreigners, and ignorant of the law, is no excuse for bringing them within the exceptions of the act as regards penalty;<sup>154</sup> and it would seem that the fact that all proceedings in relation to the estate are stayed upon proceedings for revocation of probate of the will of decedent prevents penalty, but does not prevent the running of ordinary interest charged for nonpayment of the tax.<sup>155</sup>

Where, under the act of 1887,<sup>156</sup> the liability for penalty for nonpayment of tax has been removed, interest is only chargeable at the rate of 6 per cent. from the expiration of 18 months after decedent's death. Under the act of 1892,<sup>157</sup> where the penalty is removed interest is now chargeable from the date of death. Under a saving clause, however, this provision of the act does not apply to the estate of one dying before the passage of the act. In such case the former act applies.<sup>158</sup>

The act of 1887 provided that the penalty should not be imposed where, by reason of claims upon the estate, litigation or other unavoidable cause of delay, "the estate of any decedent or a part thereof could not be settled at the end

<sup>153</sup> Commonwealth's Appeal (Fagely's Estate) 128 Pa. St. 603, 18 Atl. 386.

<sup>154</sup> In re McKean's Estate, *supra*; In re Platt (1894) 29 N. Y. Supp. 396. As to what constitutes excusable delay and when executor liable for interest, see In re Banks' Estate, 5 Pa. Co. Ct. R. 614, 616.

<sup>155</sup> In re Stewart, 131 N. Y. 274, 30 N. E. 184; citing Code Civ. Proc. §§ 2650, 406.

<sup>156</sup> Laws 1887, c. 713, §§ 4, 5.

<sup>157</sup> Laws 1892, c. 399, § 4.

<sup>158</sup> In re Fayerweather, 143 N. Y. 119, 38 N. E. 278. See, also, as to penalty and interest, In re Ferrer, N. Y. Law J. June 30, 1892, p. 1062; In re Hoghtaling, 8 N. Y. Law J. 450; In re Purroy, 7 N. Y. Law J. 344; In re Cunningham, *Id.* 954.

of 18 months from the death of decedent," which was a reenactment of the act of 1885, except that the period of settlement was therein fixed at 1 year, instead of 18 months. Under the act of 1892, the penalty is not charged where claims, litigation, or other unavoidable cause of delay prevents "the determination and payment of the tax." It also changes the terms upon which the remission is granted. In the prior acts the 6 per cent. interest ran from the expiration of 18 months from accrual to the date when the cause of delay was removed, while in the act of 1892, in cases where the penalty is not interposed, interest at the rate of 6 per cent. is charged from the date of death until the cause of delay is removed.

Where decedent died about a year before the act of 1892 went into effect, interest and penalty are regulated by the act of 1887, then in force, and in this respect the act of 1892 was not intended to be retroactive.<sup>159</sup>

A petition for the remission of penalty is not sufficient where it appears that there were sufficient moneys at all times in the executor's hands to pay tax, independent of contested claims.<sup>160</sup>

In all applications to remit penalty, the date when the cause of delay was removed should be fixed,<sup>161</sup> and the litigation must be the necessary litigation referred to in the act.<sup>162</sup>

Penalty will be remitted where the tax has not been paid owing to litigation necessary to determine the validity of a trust.<sup>163</sup>

<sup>159</sup> In re Milne, 76 Hun, 328, 27 N. Y. Supp. 729. Contra, holding that in such cases the act of 1892 applied, see In re Acker, 9 N. Y. Law J. 350; In re Colhoun, N. Y. Law J. July 15, 1893.

<sup>160</sup> In re Hall, 12 N. Y. Law J. 784.

<sup>161</sup> In re Colhoun, N. Y. Law J. July 15, 1893.

<sup>162</sup> In re Sloane, 7 N. Y. Law J. 951; In re Cunningham, Id. 954; In re Colhoun, N. Y. Law J. July 15, 1893.

<sup>163</sup> In re Hope, N. Y. Law J. Feb. 13, 1893.

The fact that the only asset out of which the tax could be paid was a seat in the stock exchange, which the executors did not think it prudent to sell, and held for a rise, is not sufficient to relieve from penalty.<sup>164</sup> It seems that where, under decedent's will, there is a power of appointment, interest at the rate of 6 per cent. is only chargeable from the time the power is exercised. No penalty can be awarded in such case.<sup>165</sup>

Where, pending an appeal<sup>166</sup> from the appraiser's report, the parties liable to the tax under the decree of the lower court make voluntary payment of it, this does not estop the state from prosecuting the appeal, and recovering interest upon the tax to the date of payment.<sup>167</sup>

### § 69. Retroactive, Amendatory, and Repealing Statutes.<sup>168</sup>

The question as to whether estates vesting or undistributed before the passage of the law become subject to taxation seems to be purely one of legislative intent.

In England the "succession duty act" is in many respects plainly retroactive, as well as prospective, in its operations; but in this country retroactive statutes are not generally

<sup>164</sup> *In re Colhoun*, N. Y. Law J. July 15, 1893.

<sup>165</sup> *In re Purroy*, N. Y. Law J. March 6, 1892, citing *In re Stewart*, 13 N. Y. 274, 30 N. E. 184; *Id.* (Surr.) 10 N. Y. Supp. 15; *In re Cunningham*, 7 N. Y. Law J. 954.

<sup>166</sup> See practice on such appeals. Chapter 5, § 55.

<sup>167</sup> *Commonwealth's Appeal* (Fagely's Estate) 128 Pa. St. 603, 18 Atl. 386. As to effect of receipt in full for tax given by state, see chapter 7, § 63, note 146; *In re Brewer's Estate*, 16 Pittsb. Leg. J. (N. S.) 114; 15 Pittsb. Leg. J. (N. S.) 435; *Commonwealth's Appeal*, supra; *In re Keenan* (Surr.) 5 N. Y. Supp. 200; *In re Vanderbilt's Estate* (Surr.) 10 N. Y. Supp. 239.

<sup>168</sup> See the retroactive New York act of 1892, c. 399, § 1, subd. 3; acts of congress and English statutes discussed in chapter 6, § 58, subds. 3, f.

avored, and the statutes are held to apply only to property passing upon the death of a decedent occurring after the particular statute went into effect. Acts, however, which impose a tax upon estates vesting or undistributed before such acts became operative, though retroactive, are held to be constitutional.<sup>169</sup>

But a retroactive operation will not be given by construction, so as to subject to the tax estates passing prior to the passage of the act, though they be subject to life estates which do not fall until after the statute became operative.<sup>170</sup>

Under this rule, it has been held in New York that property conveyed by irrevocable deed of trust to trustees to pay the income to the grantor during life, with remainder over to collateral heirs after her death, which was executed and took effect before the passage of the act, is not liable to taxation, though the grantor died afterwards.<sup>171</sup> This holding, in view of subsequent cases, is, however, doubtful.\*

So, as the tax is generally imposed upon the estate owned by the decedent passing at the time of death, interest or income in the nature of increase or accretions to the estate subsequently arising is not liable.<sup>172</sup>

There are, however, cases which seem to be exceptions to this rule, as in the case of powers of appointment not

<sup>169</sup> Chapter 2, § 24; *Carpenter v. Pennsylvania*, 17 How. 456; *Attorney General v. Middleton*, 3 Hurl. & N. 125; *In re Short's Estate*, 16 Pa. St. 66.

<sup>170</sup> *Folsom v. U. S.*, 21 Fed. 37; *Blake v. McCartney*, 4 Cliff. 101, Fed. Cas. No. 1498; *Succession of Oyon*, 6 Rob. (La.) 504; *Succession of Deyraud*, 9 Rob. (La.) 357; *Carpenter v. Pennsylvania*, supra; *In re Cogswell*, 4 Dem. Sur. 248; *In re Hendricks (Surr.)* 3 N. Y. Supp. 281.

<sup>171</sup> *In re Hendricks*, supra.

\* See *In re Lines' Estate*, 155 Pa. St. 388, 26 Atl. 728.

<sup>172</sup> *In re Miller's Estate*, 45 Leg. Int. 175; *Com. v. Freedley*, 21 Pa. St. 33-36; *Commonwealth's Appeal (Cooper's Estate)* 127 Pa.

executed until long after testator's death;<sup>173</sup> and in England, under the peculiar provisions of the statute, a tax has been allowed upon the subsequent increase in value of property already once assessed.<sup>174</sup>

Where, by the terms of testator's will, the first year's income is added to principal, and both principal and income applied, indiscriminately and without distinction, to the payment of debts and legacies, the collateral tax accrues upon so much of the corpus as has thus been preserved to pass from testator to his collateral heirs.<sup>175</sup>

So, generally, the rate of the tax is that imposed or fixed at the time the estate passed and became subject to the tax, and not that imposed by subsequent statute.<sup>176</sup>

In New York, by statute, and doubtless in many other states, the common-law rule that a statute was deemed to date and take effect as of the first day of the session at which it was passed<sup>177</sup> is now abrogated;<sup>178</sup> and in that state every law, unless a different time shall be prescribed therein, commences and takes effect throughout the state on, and not before, the 20th day after the day of its final passage, as certified by the secretary of state.<sup>179</sup>

St. 435, 17 Atl. 1094, affirming 5 Parker, Cr. R. 275; Attorney General v. Sefton, 11 H. L. Cas. 257-269.

<sup>173</sup> Chapter 6, § 60. See *In re Stewart*, 131 N. Y. 274, 30 N. E. 184; *Id.* (Surr.) 10 N. Y. Supp. 15.

<sup>174</sup> See chapter 5, § 55; *Attorney General v. Dardier*, L. R. 11 Q. B. Div. 16.

<sup>175</sup> *In re Williamson's Estate*, 143 Pa. St. 150, 22 Atl. 836. *Contra*, *In re Floyd*, 4 N. Y. Law J. 1378.

<sup>176</sup> *Com. v. Eckert*, 53 Pa. St. 102; *Com. v. Smith*, 20 Pa. St. 100; *In re King's Estate*, 11 Phila. 26; *In re James' Appeal*, 2 Del. Co. Rep. 164.

<sup>177</sup> *Latless v. Holmes*, 4 Term R. 660; *Panther's Case*, 6 Brown, Parl. Cas. 486.

<sup>178</sup> *In re Kemeys*, 56 Hun, 117, 9 N. Y. Supp. 182. See, also, *In re Howe*, 48 Hun, 236, affirmed 112 N. Y. 103, 19 N. E. 513.

<sup>179</sup> 1 Rev. St. N. Y. (7th Ed.) p. 433, § 12.

This provision has been considered in connection with acts imposing collateral inheritance taxes, and it has been held that although the act of 1885 contained the words, "after the passage of this act," the law did not take effect until 20 days after its passage, and that, therefore, property passing by will of one dying after the passage of the act, but prior to the day upon which it took effect, was not liable to the tax.<sup>180</sup> So an act providing that "it shall take effect immediately" does not apply to the estate of a testator who died on the same day, but just before the act was approved.<sup>181</sup>

With regard to amendatory statutes, the rule seems to be general that they have no retroactive force upon taxes already due, unless clearly intended by the legislature, as the portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along, and the new parts or changed portions are not to be taken as the law at any time prior to the passage of the amended act.<sup>182</sup>

When a statute amends a former statute "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions therein omitted in the latter. When, however, the amendatory act re-enacts provisions in the former law, either *ipsissimis verbis*, or by the use of equivalent though different words, the law will be regarded as having been continuous; and the new enactment, as to such parts, will not operate as a

<sup>180</sup> *In re Howe*, *supra*, overruling *In re Chardavoyne*, 5 Dem. Sur. 466. *In re Cager*, 46 Hun, 660, is also overruled on this point. See 111 N. Y. 347, 18 N. E. 866, and *In re Kemeys*, *supra*.

<sup>181</sup> Laws 1891, c. 215; *In re Dreyfous* (1892; Surr.) 18 N. Y. Supp. 767.

<sup>182</sup> *In re Arnett*, 49 Hun, 599, 2 N. Y. Supp. 428; *In re Miller's Estate*, 110 N. Y. 223, 18 N. E. 139, citing *Ely v. Holton*, 15 N. Y. 595.

repeal, so to affect a duty accrued under the prior law, although as to all new transactions, the later law will be referred to as the ground of obligation. Accordingly, the direct tax act of 1891,<sup>183</sup> which amended, "so as to read as follows," the first section of the act of 1885,<sup>184</sup> did not operate to prevent the subsequent assessment and collection of a tax on the estate of a decedent who died intermediate the act of 1887 and that of 1891.<sup>185</sup>

The liability to the tax of the estates of decedents dying previous to its passage is continued by Laws 1892,<sup>186</sup> and proceedings instituted thereunder may be continued thereafter under the prior law. All proceedings instituted thereafter are regulated, however, by the last act, though the law in existence at decedent's death must govern as to rights accrued and liabilities incurred.<sup>187</sup>

So where an amendatory act was passed by the legislature, purporting to exempt adopted children theretofore liable, which, it was declared, should "take effect immediately," and subsequent to its passage, but before being approved by the executive, a decree was made taxing adopted children, it was held that the decree was not vitiated by the amendatory statute, as it did not become a law at the time of its passage, but only subsequently, and from the time of its approval by the executive.<sup>188</sup>

<sup>183</sup> Laws N. Y. 1891, c. 215.

<sup>184</sup> Laws 1885, c. 483.

<sup>185</sup> *In re Prime* (1893) affirmed 64 Hun, 50, 18 N. Y. Supp. 603, and 136 N. Y. 353, 32 N. E. 1091, distinguishing *Ely v. Holton*, 15 N. Y. 595.

<sup>186</sup> Chapter 399.

<sup>187</sup> *In re Richardson*, N. Y. Law J. Jan. 31, 1893; *In re Sterling's Estate* (1894; Surr.) 30 N. Y. Supp. 385, citing *In re Miller*, 19 N. Y. St. Rep. 246.

<sup>188</sup> *In re Kemeys*, supra; *In re Howe*, 48 Hun, 236, affirmed 112 N. Y. 103, 19 N. E. 513; *In re Hughes*, 2 N. Y. Law J. (July 27, 1889) 817; *In re Dreyfous*, supra.

Where, however, the assessment under the prior law was made after the passage of the act relieving adopted children, or those standing in the "mutually acknowledged relation," they are not subject to the tax.<sup>189</sup>

So, where adopted children were exempted by a statute<sup>190</sup> which was declared to be amendatory of the prior law, it was held not retroactive, and that such adopted children as were liable under the former act<sup>191</sup> continued so liable, and the rights of the state were not affected by the fact that the tax had not been paid at the time of the passage of the amendatory act.<sup>192</sup>

The New Jersey act<sup>193</sup> does not affect real estate devised previous to the passage of the act.<sup>194</sup>

Nor does such a statute affect the vested rights of the state against such children theretofore liable, although proceedings to collect the tax were not commenced until after the amended statute went into effect.<sup>195</sup>

It seems now, however, that all adopted children and

<sup>189</sup> In re Thomas, 3 Misc. Rep. 388, 24 N. Y. Supp. 713, distinguishing In re Kemeys, supra.

<sup>190</sup> Appendix, Laws 1887, c. 713, § 1. See, upon this subject, chapter 3, § 6.

<sup>191</sup> Laws 1885, c. 483.

<sup>192</sup> In re Miller, supra, affirming 47 Hun, 394; In re Brooks, 6 Dem. Sur. 165; In re Spencer's Estate (Surr.) 4 N. Y. Supp. 395.

<sup>193</sup> Laws 1894, c. 210, Appendix, II.

<sup>194</sup> In re Dobermiller, 17 N. J. Law J. 378.

<sup>195</sup> In re Kemeys (per Barrett, J., reviewing cases) 56 Hun, 117, 9 N. Y. Supp. 182, distinguished in Re Thomas, 3 Misc. 388, 24 N. Y. Supp. 713. For other authorities, see In re Arnett, 49 Hun, 599, 2 N. Y. Supp. 428; In re Kissam's Estate (Surr.) 3 N. Y. Supp. 135; In re Ryan's Estate (Surr.) 3 N. Y. Supp. 136; In re Cager, 111 N. Y. 347, 18 N. E. 866; In re Brooks, 6 Dem. Sur. 165; In re Hendricks' Estate (Surr.) 3 N. Y. Supp. 281; In re Thompson, 6 Dem. Sur. 211; In re Shaw's Estate, N. Y. Daily Reg. April 3, 1889. Contra, In re Cager, 46 Hun, 660, overruled in 111 N. Y. 347, 4 N. E. 713; In re Spencer's Estate (Surr.) 4 N. Y. Supp. 395.



others in the same class are exempted in New York,<sup>196</sup> where no assessment was made against them, by order of the surrogate, at the time of the passage of the last-named act.<sup>197</sup>

So the act of 1890,<sup>198</sup> relieving certain charitable and religious institutions from the tax, being clearly prospective in its operation, and applicable only to future cases, a tax due before the act went into operation<sup>199</sup> may still be enforced.<sup>200</sup>

Where, however, the statute under which it is sought to collect the tax has not merely been amended, but absolutely repealed, and the remedy taken away, all proceedings under the prior act fall, and the tax cannot afterwards be collected.<sup>201</sup>

<sup>196</sup> Laws N. Y., Appendix, I. a, § 25, as amended by Laws 1889, c. 479. The children of such adopted children are, however, not within the exemption of the statute. In *re Bird's Estate* (Surr.) 11 N. Y. Supp. 895. In Connecticut they are relieved by express provision of the statute, *supra*, chapter 3, § 34, subd. g.

<sup>197</sup> Laws 1889, *supra*; In *re Kemeys*, 56 Hun, 117, 9 N. Y. Supp. 182; In *re Hughes' Estate*, *supra*; In *re Thorne's Estate*, N. Y. Law J. Jan. 21, 1890; In *re Thomas*, *supra*.

<sup>198</sup> Chapter 553, Appendix, I. b.

<sup>199</sup> June 7, 1890.

<sup>200</sup> *Sherrill v. Christ Church of Poughkeepsie*, 31 N. Y. St. Rep. 896, 121 N. Y. 701, 25 N. E. 50, reversing In *re Van Kleeck*, 55 Hun, 472. See, also, *Estate of Minturn*, 3 N. Y. Law J. 804. As to the effect of the act of Pennsylvania of 1887 upon prior statutes of that state, see *Commonwealth's Appeal* (Fagely's Estate) 128 Pa. St. 612, 18 Atl. 386; In *re Del Busto's Estate*, 23 Wkly. Notes Cas. 111; *Commonwealth's Appeal* (Cooper's Estate) 127 Pa. St. 435, 17 Atl. 1094; *Commonwealth's Appeal* (Bittinger's Estate) 129 Pa. St. 338, 18 Atl. 132; *Mellon's Appeal*, 114 Pa. St. 570, 8 Atl. 183; In *re Banks' Estate*, 5 Pa. Co. Ct. R. 614; In *re Goldstein's Estate*, 16 Phila. 319; *Wayne's Estate*, 2 Pa. Co. Ct. R. 93; *Fox v. Com.*, 16 Grat. 1.

<sup>201</sup> In *re Arnett*, 49 Hun, 603, 2 N. Y. Supp. 428; *Knox v. Baldwin*, 80 N. Y. 610; *Nash v. Bank*, 105 N. Y. 243, 11 N. E. 946; In *re Prime*, 136 N. Y. 347, 362, 32 N. E. 1091; *People v. Supervisors*, 67

Where, however, there is a saving clause as to taxes accruing under vested interests prior to the repealing act, such taxes may be assessed and collected afterwards.<sup>202</sup>

Where the decedent died before the repealing act, and the legatee or successor did not come into possession, nor his rights accrue, until after the repealing act went into effect, it seems the tax is not saved by the saving clause.<sup>203</sup>

N. Y. 109; *Bailey v. Mason*, 4 Minn. 550 (Gil. 430); *Dunwell v. Bidwell*, 8 Minn. 34 (Gil. 18); *In re North Canal Street Road*, 10 Watts (Pa.) 351; *Cooley*, Tax'n (2d Ed.) p. 18; *Fox's Adm'r v. Com.*, 16 Grat. 1; *Eyre v. Jacob*, 14 Grat. 422. See *Quessart v. Canonge*, 3 La. 560, and *Arnaud v. Holland*, Id. 337, where it was held that where the tax becomes due before the repealing act the rights of the state under the law existing at the time remain unaffected by the repealing act.

<sup>202</sup> Act Cong. 1870 (16 Stat. 261, § 17), repealing the legacy and succession acts, contained a clause saving "all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts or drawbacks, or which may hereafter accrue under said acts," etc. See, construing this section, *May v. Slack*, 16 Int. Rev. Rec. 134, Fed. Cas. No. 9,336; *U. S. v. Townsend*, 8 Fed. 306; *Clapp v. Mason*, 94 U. S. 589.

<sup>203</sup> *Mason v. Sargent*, 104 U. S. 689. See *Id.*, 23 Int. Rev. Rec. 155, Fed. Cas. No. 9,253; *Sturges v. U. S.*, 117 U. S. 363, 6 Sup. Ct. 767; *Helman v. U. S.*, 15 Blatchf. 13, Fed. Cas. No. 6,341; *U. S. v. New York Life Ins. & Trust Co.*, 9 Ben. 413, Fed. Cas. No. 15,873; *Clapp v. Mason*, *supra*; *U. S. v. Hazard*, 8 Fed. 380; *U. S. v. Kelley*, 28 Fed. 845; *U. S. v. Brice*, 8 Fed. 381. See *U. S. v. Rankin*, Id. 872, where the various conflicting decisions under the legacy and succession acts of congress are considered by Treat, District Judge. And see, generally, *Com. v. Standard Oil Co.*, 101 Pa. St. 149.

# APPENDIX OF STATUTES.

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## I. NEW YORK.<sup>1</sup>

- (a) Laws 1887, c. 713, with Amendments to 1892.
- (b) Laws 1890, c. 553, as to Charitable Corporations.
- (c) Laws 1892, c. 169.
- (d) Laws 1892, c. 443.
- (e) "Transfer Tax Act," Laws 1892, c. 399, with Amendments to 1895.
- (f) Special Acts.

## II. NEW JERSEY.

## III. PENNSYLVANIA.

## IV. MASSACHUSETTS.

- (a) Laws 1891, c. 425, with Amendments to 1895.
- (b) Laws 1893, c. 432.
- (c) Laws 1895, c. 307.

## V. MAINE.

## VI. OHIO.

- (a) Laws 1893, p. 14, as Amended by Laws 1894, p. 169.
- (b) Laws 1894, p. 166.

## VII. CONNECTICUT.

## VIII. MARYLAND.

## IX. CALIFORNIA.

## X. ILLINOIS.

### I. NEW YORK STATUTES.

- (a) LAWS 1887, CH. 713, WITH AMENDMENTS TO 1892.

An act to amend chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases."

Passed June 25, 1887; three-fifths being present.

<sup>1</sup>(The statute now in force in the state of New York is chapter 399 of the Laws of 1892, known as the "Transfer Tax Act." By section 23 of this act, most of the earlier statutes have been repealed as follows: Laws 1885, c. 483; Laws 1887, c. 713; Laws 1889, c. 307; Laws 1889, c. 479; Laws 1891, c. 215. For the benefit of the profession and in order that all the earlier statutes may be readily consulted, it has been deemed prudent to retain these statutes, beginning with that of 1887.)

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," is hereby amended so as to read as follows:

**State tax upon certain property, &c., passed by will or intestate laws—Rate of tax and to whom payable—Estates under \$500 exempt.**

§ 1. After the passage of this act all property which shall pass by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom which shall be transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations and institutions now exempted by law from taxation by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property, or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the state, and all administrators, executors and trustees, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax.

[See Laws 1892, c. 169, amending this section. See post, subd. c.]

**Appraisal of property after death of decedent in certain cases—Duty of surrogate as to valuation—Tax to be immediately payable thereon—Persons, &c., beneficially interested may give bond therefor, &c.—Verified return of property to surrogate.**

§ 2. When any grant, gift, legacy or succession upon which a tax is imposed by section first of this act, shall be an estate, income or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund, by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, at what was the fair and clear market value thereof at the time of the death of the decedent, in the manner hereinafter provided, and the surrogate shall thereupon assess and determine the value of the estate, income or interest subject to said tax, in the manner recorded in section thirteen of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and in the city or county of New York to the comptroller thereof, and together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided that the person or persons, or body politic or corporate beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property and in that case such person or persons or body politic or corporate, shall give a bond to the people of the state of New York in a penalty of three times the amount of the tax arising upon personal estate, with such sureties as the surrogate of the proper county may approve conditioned for the payment of said tax and interest thereon at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate of the proper county; provided, further, that such person shall make a full verified return of such property to said surrogate, and file the same in his office within one year from the death of the decedent, and within that period enter into such security and renew the same every five years.

**Executors or trustees, commissions of, when liable to tax.**

§ 3. Whenever a decedent appoints or names one or more executors or trustees and makes a bequest or devise of property to them in lieu of their commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devise or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to said tax, and the surrogate's court having jurisdiction in the case shall fix such compensation.

**Taxes, when due and payable—Interest thereon.**

§ 4. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per cent. per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof a discount of five per cent. shall be allowed and deducted from said tax, and in all cases where the executors, administrators or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section two of this act for the payment of said tax, together with interest.

**Penalty for non-payment of tax—When and how chargeable.**

§ 5. The penalty of ten per cent. per annum imposed by section four hereof, for the nonpayment of said tax, shall not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months, from the death of the decedent, and in such cases only six per cent. per annum shall be charged upon the said tax, from the expiration of said eighteen months until the cause of such delay is removed.

**Deductions of tax from legacies by trustees, etc.—  
Payments, how made if legacy is not in money  
—Tax, how enforced—Other provisions as to  
limited bequests, etc.**

§ 6. Any administrator, executor or trustee having in charge, or trust, any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee, and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of such legacy might be enforced; if, however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of his accounts, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

**Sale of property of decedent to pay tax.**

§ 7. All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

**Payments, when to be made to county treasurer—  
Transmission of receipt therefor to state comp-  
troller — Return of receipt, countersigned as  
voucher to executor, etc.**

§ 8. Every sum of money retained by an executor, administrator or trustee, or paid into his hands, for any tax on any property, shall be paid by him within thirty days thereafter, to the treasurer of the proper county, or in the city and

county of New York, to the comptroller thereof, and the said treasurer or comptroller shall give, and every executor, administrator or trustee shall take duplicate receipts from him of such payment, one of which receipts he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax, with the amount thereof, and shall seal said receipt with the seal of his office, and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts, but an executor, administrator or trustee shall not be entitled to credits in his accounts, nor be discharged from liability for such tax, unless he shall produce a receipt so sealed and countersigned by the comptroller or a copy thereof certified by him.

**Executor, etc., to notify county treasurer, etc., as to passing of real estate.**

§ 9. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corporate, or to any person or persons other than his or her father, mother, husband, wife, lawful issue, brother, sister, wife or widow of a son, or husband of a daughter, or child or children adopted by such decedent according to law, or any person to whom the deceased for not less than ten years prior to his or her death, stood in the mutually acknowledged relation of a parent, or in trust for them, or some of them, it shall be the duty of the executors, administrators or trustees of such decedent, to give information thereof in writing to the treasurer or comptroller of the county where such real estate is situate, within six months after they undertake the execution of their respective duties, or if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

**Repayment of proportion of tax paid, in cases of debts proven afterwards.**

§ 10. Whenever any debts shall be proven against the estate of a decedent, after the payment of legacies or distribution of property from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the



county treasurer, comptroller, or to the state treasurer, or by them if it has been so paid.

**Tax upon transfer of stocks by foreign executor, etc.**

§ 11. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state, standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasurer or comptroller of the proper county on the transfer thereof, otherwise the corporation permitting such transfer shall become liable to pay such tax, provided that such corporation had knowledge before such transfer that said stocks or loans are liable to said tax.

**Tax erroneously paid, refunding of.**

§ 12. When any amount of said tax shall have been paid erroneously to the state treasurer, it shall be lawful for him, on satisfactory proof rendered to the comptroller by said county treasurer or comptroller of such erroneous payment, to refund and pay to the executor, administrator, person or persons who have paid any such tax in error, the amount of such tax so paid, provided that all such applications for the payment of such tax shall be made within five years from the date of such payment.

**Surrogate to appoint appraiser of certain estates—**

**Duty of appraiser—To report to surrogate—Surrogate to fix cash values of estates and tax thereon—Rules of computation—Appeals from appraisement—Compensation of appraiser.**

§ 13. In order to fix the value of property of persons whose estates shall be subject to the payment of said tax, the surrogate, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as, and whenever occasion may require, whose duty it shall be forthwith to give such notice by mail to all persons known to have or claim an interest in such property, and to such persons as the surrogate may by order direct, of the time and place he will appraise such property; and at such time and place, to appraise the same at its fair market value, and make a report thereof in writing to said surrogate, together with such other facts in relation thereto as said surrogate may by order require, to be filed in the

office of such surrogate; and from this report the said surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice thereof by mail to all parties known to be interested therein, and the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per cent. per annum; and the superintendent of the insurance department shall, on the application of any surrogate, determine the value of such future or contingent or limited estate, income or interest, upon the facts contained in such report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computations adopted therein is correct. Any person or persons dissatisfied with such appraisement or assessment may appeal therefrom to the surrogate of the proper county within sixty days after the making and filing of such assessment, on paying or giving security approved by the surrogate to pay all costs, together with whatever tax shall be fixed by said court. The said appraiser shall be paid by the county treasurer or comptroller out of any funds he may have in his hands on account of said tax, on the certificate of the surrogate, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses including the fees paid such witnesses. The comptroller of the city and county of New York shall retain out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the surrogate in the city and county of New York with a clerk appointed by said surrogate who shall be known as the "collateral inheritance and legacy tax clerk," and whose salary shall be two thousand, four hundred dollars a year, payable monthly, and a further sum of money, not exceeding five hundred dollars a year, to be used to pay the expenses of the said surrogate necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and

requisitions of said surrogate respectively. [Laws 1889, c. 307, as amended. See chapter 167, Laws 1892.]

### **Appraiser accepting bribe, how punished.**

§ 14. Any appraiser appointed by virtue of this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors, he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and imprisoned not exceeding ninety days, and in addition thereto the surrogate shall dismiss him from such service.

### **Jurisdiction of surrogate's court.**

§ 15. The surrogate's court in the county in which the real property is situate of a decedent who was not a resident of the state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.

### **Citation to issue to person liable for tax, if remaining unpaid—Proceedings thereupon—Decree, how docketed and filed—Transcripts thereof, when to be furnished—County treasurer to notify district-attorney of failure to pay tax—Duty of district-attorney—Costs.**

§ 16. If it shall appear to the surrogate's court that any tax accruing under this act has not been paid according to law, it shall issue a citation citing the persons interested in the property liable to the tax to appear before the court on a day certain, not more than three months after the date of such citation, and show cause why said tax should not be paid. The service of such citation and the time, manner and proof thereof, and fees therefor, and the hearing and determination thereon, and the enforcement of the determination or decree shall conform to the provisions of the Code of Civil Procedure, for the service of citations now issuing out of surrogates' courts, and the hearing and determination thereon and its enforcement. And the surrogate, or clerk of the

surrogate's court, shall, upon the request of the district-attorney, treasurer of the county, or comptroller of the county of New York, furnish, without fee, one or more transcripts of such decree as provided in section twenty-five hundred and fifty-three of the Code of Civil Procedure, and the same shall be docketed and filed by the county clerk of any county in the state without fee, in the same manner, and with the same effect as provided by said section for filing and docketing transcripts of decrees of such courts.

§ 17. Whenever the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax to pay the same, he shall notify the district-attorney of the proper county, in writing, of such failure to pay such tax, and the district-attorney so notified, if he have probable cause to believe the tax is due and unpaid, shall prosecute the proceeding in the surrogate's court in the proper county, as provided in section sixteen of this act for the enforcement and collection of such tax. All costs awarded by such decree, that may be collected after the collection and payment of the tax, to the treasurer or comptroller of the proper county, may be retained by the district-attorney, for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest the sum of \$100, or where there has been a contest the sum of \$250. [As amended by Laws 1892, c. 168.]

#### **Quarterly statements of surrogate and county clerk.**

§ 18. The surrogate and county clerk of each county shall, every three months, make a statement in writing to the county treasurer or comptroller of his county of the property from which or the party from which he has reason to believe a tax under this act is due and unpaid.

#### **Payment of certain expenses of county treasurer.**

§ 19. Whenever the surrogate of any county shall certify that there was probable cause for issuing a citation and taking the proceedings specified in section seventeen of this act, the state treasurer shall pay or allow to the treasurer or comptroller of any county all expenses incurred for services of citation and his other lawful disbursements that have not otherwise been paid.

**Surrogate's record, what to contain.**

§ 20. The comptroller of the state shall furnish to each surrogate a book in which he shall enter the returns made by appraisers, the cash value of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon and the amounts of any receipts for payments thereon filed with him, which books shall be kept in the office of the surrogate as a public record.

**Payment of tax to state treasurer—Reports thereon to comptroller—Interest upon unpaid amounts.**

§ 21. The treasurer of each county and the comptroller of the county of New York shall collect and pay the state treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor, of which collection and payment he shall make a report under oath to the comptroller on the first Monday in March and September of each year, stating for what estate paid, and in such form and containing such particulars as the comptroller may prescribe; and for all such taxes collected by him and not paid to the state treasurer by the first day of October and April of each year he shall pay interest at the rate of ten per cent. per annum.

**Fees of county treasurer and N. Y. City comptroller.**

§ 22. The treasurer of each county and the comptroller of the city and county of New York shall be allowed to retain, on all taxes paid and accounted for by him each year under this act, in addition to his salary or fees now allowed by law, five per cent. on the first fifty thousand dollars so paid and accounted for by him, three per cent. on the next fifty thousand dollars so paid and accounted for by him, and one per cent. on all additional sums so paid and accounted for by him.

**Receipt from county treasurer, &c., as to payment of tax, how recorded—"Collateral tax" record.**

§ 23. Any person or body politic or corporate shall, upon payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county, or comptroller of the county of New York, or a copy of the receipt, at his option, that may have been given by said treasurer or comptroller for the payment of any tax under this act, to be

sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any decedent may have died seized, said tax has been paid, and by whom paid, and whether or not it is in full of said tax, and said receipt may be recorded in the clerk's office of the county in which said property is situate, in a book to be kept by said clerk for such purpose, which shall be labeled "Collateral Tax."

### Uses of taxes paid and how applied—Repeal.

§ 24. All taxes levied and collected under this act, shall be paid into the treasury of the state, for the uses of the state, and shall be applicable to the payment of the general expenses of the state government and to such other purposes as the legislature may by law direct.

§ 25. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed; but this act shall apply to all estates of deceased persons where no assessment of the tax has been made to which such estate or estates are liable under the provisions of the foregoing act. [As amended by Laws 1889, c. 479.]

§ 26. This act shall take effect immediately.

### (b) LAWS 1890, CH. 553, AS TO CHARITABLE CORPORATIONS.

An act to amend chapter one hundred and ninety-one of the Laws of Eighteen Hundred and Eighty-Nine, entitled "An act to limit the amount of property to be held by corporations organized for other than business purposes," and relating to such corporations.

Approved by the governor June 7, 1890. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Chapter one hundred and ninety-one of the Laws of Eighteen Hundred and Eighty-Nine, entitled "An act to limit the amount of property to be held by corporations organized for other than business purposes," is hereby amended so as to read as follows:

**Amount of property of certain corporations, limited  
—Exemption from certain taxation and collateral  
inheritance act—Proviso.**

§ 1. Any religious, educational, Bible, missionary, tract, literary, scientific, benevolent or charitable corporation, or corporation organized for the enforcement of laws relating to children or animals, or for hospital, infirmary, or other than business purposes, may take and hold, in its own right or in trust for any purpose comprised in the objects of its incorporation, property not exceeding in value three million dollars, or the yearly income derived from which shall not exceed two hundred and fifty thousand dollars, notwithstanding the provisions of any special or general act heretofore passed or certificate of incorporation affecting such corporations. In computing the value of such property no increase in value arising otherwise than from improvements made thereon, shall be taken into account. The personal estate of such corporations shall be exempt from taxation, and the provisions of chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," and the acts amendatory thereof, shall not apply thereto, nor to any gifts to any such corporation by grant, bequest or otherwise; provided, however, that this provision shall not apply to any moneyed or stock corporation deriving an income or profit from the capital or otherwise, or to any corporation which has the right to make dividends or to distribute profits or assets among its members.

**Special statutes not affected hereby.**

§ 2. This act shall not affect the right of any such corporation to take and hold property exceeding in value the amount specified in section one of this act, provided such right is conferred upon such corporation by special statute; nor affect any statute by which its real estate is exempt from taxation.

§ 3. This act shall take effect immediately.

## (c) LAWS 1892, CH. 169.

An act to amend chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases."

Approved by the governor March 19, 1892. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Section one of chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five as amended by chapter seven hundred and thirteen of the Laws of Eighteen Hundred and Eighty-Seven and as further amended by chapter two hundred and fifteen of the Laws of Eighteen Hundred and Ninety-One is hereby amended to read as follows:

**Property passing by will, etc.**

§ 1. After the passage of this act all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state; or, if the decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state; or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy to any property or the income thereof, other than to or for societies, corporations and institutions now exempted by law from taxation, or from collateral inheritance tax, shall be and is subject to a tax at the rate hereinafter specified, to be paid to the treasurer of the proper county, and in the county of New York, to the comptroller thereof, for the use of the state; and all heirs, legatees, devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed.



When the beneficial interest to any personal property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of New York, or to any person to whom the deceased, for not less than ten years prior to death, stood in the mutually acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock; in every such case the rate of such tax shall be one dollar on every hundred dollars of the clear market value of such property, and at and after the same rate for every less amount, provided that an estate which may be valued at a less sum than ten thousand dollars shall not be subject to any such duty or tax; but if such beneficial interest is to or in land or real estate in this state, such interest shall be exempt from taxation under this section. In all other cases, the rate shall be five dollars on each and every hundred dollars of the clear market value of all property, and at and after the same rate for any less amount, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to any such duty or tax, provided further that any property heretofore devised or bequeathed or which may hereafter be devised or bequeathed to any person who is a bishop or to any religious corporation, shall be exempted from and not be subject to the provisions of this act.

§ 2. This act shall take effect immediately.

(d) LAWS 1892, CH. 443.

Repealed by chapter 199, Laws 1893, § 2.

**An act to amend chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases, as amended by chapter seven hundred and thirteen of the Laws of Eighteen Hundred and Eighty-Seven, as amended by chapter three hundred and seven of the Laws of Eighteen Hundred and Eighty-Nine, as amended by chapter one hundred and sixty-seven of the Laws of Eighteen Hundred and Ninety-two."**

Approved by the governor May 3, 1892. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Section thirteen of chapter four hundred and eighty-three of the Laws of Eighteen Hundred and Eighty-Five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," as amended by chapter seven hundred and thirteen of the Laws of Eighteen Hundred and Eighty-Seven, as amended by chapter three hundred and seven of the Laws of Eighteen Hundred and Eighty-Nine, as amended by chapter one hundred and sixty-seven of the Laws of Eighteen Hundred and Ninety-Two, is hereby amended so as to read as follows:

### **Surrogate to appoint appraiser.**

§ 13. In order to fix the value of property of persons whose estates shall be subject to the payment of said tax, the surrogate, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as, and whenever occasion may require, whose duty it shall be forthwith to give such notice by mail to all persons known to have or claim an interest in such property, and to such persons as the surrogate may by order direct, of the time and place he will appraise such property; and at such time and place, to appraise the same at its fair market value, and for that purpose the said appraiser is authorized by leave of the surrogate to issue subpoenas for and to compel the attendance of witnesses before him, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make a report thereof, and of such value, in writing to said surrogate, together with the depositions of the witnesses examined and such other facts in relation thereto and to said matter as said surrogate may by order require, to be filed in the office of such surrogate; and from this report the said surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice thereof by mail to all parties known to be interested therein, and the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value, which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of life insurance companies, save that the rate of inter-

est to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum; and the superintendent of the insurance department shall, on the application of any surrogate, determine the value of such future or contingent or limited estate, income or interest, upon the facts contained in such report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the surrogate of the proper county within sixty days after the making and filing of such assessment, on paying or giving security approved by the surrogate to pay all costs, together with whatever tax shall be fixed by said court. The said appraiser shall be paid by the county treasurer or comptroller out of any funds he may have in his hands on account of said tax, on the certificate of the surrogate, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses including the fees paid such witnesses. The comptroller of the city and county of New York shall retain out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the surrogate in the city and county of New York, with an assistant appointed by said surrogate, who shall be known as the succession tax assistant, whose salary shall be four thousand dollars a year; a succession tax clerk whose salary shall be two thousand four hundred dollars a year; an assistant clerk whose salary shall be one thousand eight hundred dollars a year, and a recording clerk whose salary shall be thirteen hundred dollars a year, said salaries to be payable monthly; and a further sum of money, not exceeding five hundred dollars a year, to be used to pay the expenses of the said surrogate necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and requisitions of said surrogate respectively. The county treasurer of the county of Kings shall retain out of any funds he may have in his hands on account of said tax a sum of money sufficient to provide the surrogate of the county of Kings with a clerk, appointed by said surrogate, who shall be known as the "inheritance and legacy tax clerk," and whose salary shall be two thousand four hundred dollars a year, payable monthly, said amount to be paid upon the certificate of said surrogate.

§ 2. This act shall take effect immediately.

**TRANSFER TAX ACT.**

(e) LAWS 1892, Ch. 399, WITH AMENDMENTS TO 1895.

Chap. 399.

An act in relation to taxable transfers of property.

Approved by the governor April 30, 1892. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

**TAXABLE TRANSFERS OF PROPERTY.**

- Section 1. Taxable Transfers.
2. Exceptions and Limitations.
  3. Lien of Tax and Payment Thereof.
  4. Discount, Interest and Penalty.
  5. Collection of Tax by Executor, Administrators and Trustees.
  6. Refund of Tax Erroneously Paid.
  7. Deferred Payments.
  8. Taxes upon Devisees and Bequests in Lieu of Commissions.
  9. Liability of Certain Corporations to Tax.
  10. Jurisdiction of the Surrogate.
  11. Appointment of Appraisers.
  12. Proceedings by Appraisers.
  13. Determination by Surrogate.
  14. Surrogate's Assistants in New York City.
  15. Proceedings for the Collection of Taxes.
  16. Receipt from the County Treasurer and Comptroller.
  17. Fees of County Treasurer and Comptroller.
  18. Books and Forms to be Furnished by the State Comptroller.
  19. Reports of Surrogate and County Clerk.
  20. Reports of County Treasurers and Comptrollers of the City of New York.
  21. Application of Taxes.
  22. Definitions.
  23. Laws Repealed.
  24. Saving Clause.
  25. Construction.
  26. When to Take Effect.

**Taxable transfers.**

§ 1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:

1. When the transfer is by will or by the intestate laws

of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor; or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act. Such tax shall be at the rate of five per cent upon the clear market value of such property, except as otherwise prescribed in the next section.

### **Exceptions and limitations.**

§ 2. When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any person to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent or to any lineal descendant of such decedent, grantor, donor, or vendor born in lawful wedlock; such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act.

### **Lien of tax and payment thereof.**

§ 3. Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax

shall be paid to the treasurer or comptroller of the county of the surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustee shall take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned by the comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section seven of this act. All taxes imposed by this act shall be due and payable at the time of the transfer, provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

### **Discount, interest and penalty.**

§ 4. If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section seven of this act interest shall be charged at the rate of six per cent. from the accrual of the tax until the date of payment thereof.

**Collection of tax by executors, administrators and trustees.**

§ 5. Every executor, administrator, or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this act, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section fifteen of this act. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

**Refund of tax erroneously paid.**

§ 6. If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, comptroller of the city of New York or to the state treasurer, or by such treasurer, comptroller, or

state treasurer, if such tax has been paid to him. When any amount of said tax shall have been paid erroneously into the state treasury, it shall be lawful for the comptroller of this state, upon satisfactory proof presented to him of the facts, to require the amount of such erroneous or illegal payment to be refunded to the executor, administrator, trustee, person or persons who have paid any such tax in error from the treasury; or the said comptroller may by order direct and allow the treasurer of any county or the comptroller of the city of New York to refund the amount of any illegal or erroneous payment of such tax out of the funds in his hands or custody to the credit of such taxes, and credit himself with the same in his quarterly account rendered to the comptroller of this state under this act; provided, however, that all applications for such refunding of erroneous taxes shall be made within five years from the payment thereof.

#### **Deferred payment.**

§ 7. Any person or corporation beneficially interested in any property chargeable with a tax under this act and executors, administrators and trustees thereof, may elect within one year from the date of the transfer thereof as herein provided not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years.

#### **Taxes upon devises and bequests in lieu of commissions.**

§ 8. If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by



law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this act.

### **Liability of certain corporations to tax.**

§ 9. If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the comptroller of the city of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the county treasurer or comptroller at least five days prior to the said transfer. And it shall be lawful for the said county treasurer or comptroller, personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this act.

### **Jurisdiction of the surrogate.**

§ 10. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this act, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the Code of Civil Procedure shall set forth the name of the

county treasurer or comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to such county treasurer or comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this act and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or comptroller were a creditor of the decedent.

### **Appointment of appraisers.**

§ 11. The surrogate, upon the application of any interested party, including county treasurers, or the comptroller of New York City, or upon his own motion, shall, as often as and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value, at the time of the transfer thereof, of property of persons whose estates shall be subject to the payment of any tax imposed by this act. If the property upon the transfer of which a tax is imposed shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value can not be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future, or contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies; except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum.

### Proceedings by appraisers.

§ 12. Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the county treasurer or comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto, and to the said matter as said surrogate may order or require. Every appraiser shall be paid on the certificate of the surrogate at the rate of three dollars per day for every day actually and necessarily employed in such appraisal, and his actual and necessary traveling expenses, and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record by the county treasurer or comptroller out of any funds he may have in his hands on account of any tax imposed under the provisions of this act.

### Determination by surrogate—Reappraisements.

§ 13. The report of the appraiser shall be filed in the office of the surrogate, and from such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith as of course determine the cash value of all estates and the amount of tax to which the same are liable; or, the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. Any person dissatisfied with the appraisal or assessment and determination of tax, may

appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this act, and of the tax to which it is liable, to all parties known to be interested therein.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive the compensation provided by sections eleven and twelve of this act. Such compensation shall be payable by the county treasurer or comptroller out of any funds he may have on account of any tax imposed under the provisions of this act, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller. [As amended by Laws 1895, c. 556.]

### **Surrogate's and District Attorneys' assistants in New York City and Erie County.**

§ 14. The comptroller of the city and county of New York shall retain out of any funds he may have in his hands on account of said tax a sum of money sufficient to provide the surrogates in the city and county of New York with an assistant, appointed by said surrogates, who shall be known as the transfer tax assistant, whose salary shall be four thousand dollars a year; a transfer tax clerk, whose salary shall be two thousand four hundred dollars a year; an assistant clerk, whose salary shall be one thousand eight hundred

dollars a year, and a recording clerk whose salary shall be one thousand three hundred dollars a year, said salaries to be paid monthly; and a further sum of money, not exceeding five hundred dollars a year, to be used to pay the expenses of the said surrogates necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and requisitions of said surrogates respectively.

The comptroller of the city and county of New York shall also retain, out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the city and county of New York with an assistant, appointed by said district attorney, who shall be known as the transfer tax assistant, whose salary shall be three thousand dollars a year; a transfer tax clerk, whose salary shall be two thousand four hundred dollars a year, and a surrogate's process server, whose salary shall be one thousand two hundred dollars a year, said salary to be payable monthly; and a further sum of money not exceeding five hundred dollars a year, to be used to pay the expenses of the said district attorney for the conduct and prosecution of the proceedings mentioned in section fifteen of this act, said amounts to be paid upon the certificate and requisition of said district attorney. The county treasurer of the county of Erie shall also retain out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the county of Erie with an assistant, appointed by the said district attorney, who shall be known as the transfer tax assistant, whose salary shall be two thousand dollars a year, said salary to be paid monthly. [As amended by Laws 1895, c. 515. See Laws 1895, c. 191, amending same section; also Laws 1894, c. 767.]

### **Proceedings for the collection of taxes.**

§ 15. If the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and

show cause why the tax should not be paid. The surrogate upon such application, and whenever it shall appear to him that any such tax accruing under this act has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the Code of Civil Procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall upon request of the district attorney, treasurer or comptroller of the county, furnish without fee one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the treasurer or comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the treasurer or the comptroller of the county all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or comptroller is cited as a party under sections eleven and twelve of this act, the state comptroller is authorized to designate and retain counsel to represent such county treasurer or comptroller therein, and to direct such county treasurer or comptroller to pay the expenses thereby incurred, out of the funds which may be in his hands on account of this tax.

And the comptroller of the state is hereby authorized, with the approval of the attorney-general, and a justice of the supreme court of the judicial district in which the former owner resided to compromise and settle the amount of such tax in any case where controversies have arisen or may hereafter arise as to the relationship of the beneficiaries to the former owner thereof. [As amended by chapter 378, Laws 1895.]

**Receipt from the county treasurer and comptroller.**

§ 16. Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the comptroller of the city of New York, or at his option to a copy of a receipt that may have been given by such treasurer or comptroller for the payment of any tax under this act, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labelled "transfer tax."

**Fees of county treasurer and comptroller.**

§ 17. The treasurer of each county and the comptroller of the city and county of New York, shall be allowed to retain on all taxes paid and accounted for by him each year, under this act, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the fees and salaries now allowed by law to such officers, except that in the counties of Erie and Monroe, such per centum shall be credited to and belong to the county where collected. [As amended by Laws 1893, c. 704.]

**Books and forms to be furnished by the state comptroller.**

§ 18. The comptroller of the state shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent, upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places, residences and relationship to him of his heirs at law, the names, and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also en-

ter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this act, and the value of annuities, life estates, terms of years and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this act filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

### **Reports of surrogate and county clerk.**

§ 19. Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. The county clerk of each county shall at the same times make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller.

### **Reports of county treasurer and of the comptroller of the city of New York.**

§ 20. Each county treasurer and the comptroller of the city of New York shall make a report under oath to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this act, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall at the same time pay the state treasurer all taxes received by him under this act and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.



**Application of taxes.**

§ 21. All taxes levied and collected under this act shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

**Definitions.**

§ 22. The words "estate" and "property" as used in this act shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this act and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift in the manner herein prescribed. The words "county treasurer," "comptroller" and "district attorney" as used in this act shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section ten of this act.

**Laws repealed.**

§ 23. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.

**Saving clause.**

§ 24. The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to May first, eighteen hundred and ninety-two, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such law had not been repealed; and all actions and proceedings, civil or criminal, commenced under or by virtue of the law

so repealed and pending on April thirtieth, eighteen hundred and ninety-two, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.

### Construction.

§ 25. The provisions of this act, so far as they are substantially the same as those of laws existing on April thirtieth, eighteen hundred and ninety-two, shall be construed as a continuation of such laws modified or amended according to the language employed in this act, and not as new enactments. References in laws not repealed to provisions of laws incorporated into this act and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this act shall be construed to amend or repeal any provision of the Criminal or Penal Code.

### When to take effect.

§ 26. This act shall take effect on May first, eighteen hundred and ninety-two.

### Schedule of Laws Repealed.

Laws of	Chapter	Sections.
1885 . . . . .	483 . . . . .	All.
1887 . . . . .	713 . . . . .	All.
1889 . . . . .	307 . . . . .	All.
1889 . . . . .	479 . . . . .	All.
1891 . . . . .	215 . . . . .	All.

### (f) SPECIAL ACTS.

#### 1. *Laws 1893, Ch. 199.*

An act to make provision for the collection, in the county of Kings, of the tax under chapter three hundred and ninety-nine of the Laws of Eighteen Hundred and Ninety-Two, entitled "An act in relation to taxable transfers of property," by authorizing the appointment of certain officers and making provisions for the salaries thereof, and for the payment of certain expenses incidental to such collection.

Approved by the governor March 24, 1893. Passed, three fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

§ 1. The county treasurer of the county of Kings from time to time shall retain out of any funds which he may have in his hands on account of the taxes collected under chapter three hundred and ninety-nine of the Laws of Eighteen Hundred and Ninety-Two, entitled "An act in relation to taxable transfers of property," such sums of money as shall be sufficient to provide the surrogate of the county of Kings with an assistant to be known as the transfer tax assistant whose salary shall be four thousand dollars a year, payable monthly, and a transfer tax clerk whose salary shall be two thousand dollars a year, payable monthly, and which said transfer tax assistant and transfer tax clerk the surrogate of Kings county is hereby authorized to appoint immediately upon the passage of this act. And the said county treasurer shall also retain out of said funds a further sum not exceeding five hundred dollars in any one year for the necessary expenses of the said surrogate incurred in the assessment and collection of said tax. The said salaries and said amount shall be paid upon the certificates and requisitions of the said surrogate respectively.

§ 2. Chapter four hundred and forty three of the Laws of Eighteen Hundred and Ninety-Two is hereby repealed.

§ 3. This act shall take effect immediately.

2. *Section 48c, Ch. 692, Laws 1893, p. 1725.*

### **Appraiser taking fee or reward.**

An appraiser appointed by virtue of the taxable transfers law, who takes any fee or reward from an executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay such tax, or any portion thereof, is guilty of a misdemeanor.

3. *Laws 1895, Ch. 861.*

An act to further provide for the collection in the county of Westchester of the tax under the act relating to taxable transfers of property and the expenses thereof.

Became a law June 1, 1895, with the approval of the governor. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

§ 1. The county treasurer of Westchester county shall annually retain out of the funds which may come into his hands on account of the tax collected under chapter three hundred and ninety-nine of the Laws of Eighteen Hundred and Ninety-Two, entitled "An act in relation to taxable transfers of property," and the acts amendatory thereof, sufficient money to pay the salary of a clerk in the surrogate's office of said county, to be known as the "transfer tax assistant," who shall be appointed by and at pleasure removed by the surrogate, whose compensation shall be fixed by said surrogate, not to exceed two thousand dollars a year, payable monthly.

§ 2. This act shall take effect immediately.

#### 4. *Laws 1891, Ch. 34.*

An act in reference to the appraisal of the estates of decedents and others.

Approved by the governor, February 25, 1891. Passed, three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

§ 1. Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part, the estate of any deceased person, or of any insolvent estate in the hands of a receiver, or of any assignee for the benefit of creditors, or of any corporation in the hands of a receiver or otherwise, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open market in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

§ 2. This act shall take effect immediately.

## II. NEW JERSEY.

(a) CHAPTER 210, LAWS 1894, P. 318, REPEALING CHAPTER 210, LAWS 1893, AND CHAPTER 210, LAWS 1892.

### Chapter CCX.

An act to tax intestate estates, gifts, legacies, devises and collateral inheritance in certain cases.

1. Be it enacted by the senate and general assembly of the state of New Jersey, that after the passage of this act all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while being a resident of the state, and all property which shall be within this state, and any part of such property, and any interest therein or income therefrom, which shall be transferred by inheritance, distribution, bequest, devise, deed, grant, sale or gift as aforesaid, made or intended to take effect in possession or enjoyment after the death of the intestate, testator, grantor or bargainor, to any person or persons, or to a body politic or corporate excepting churches, hospitals and orphan asylums, public libraries, Bible and tract societies and all religious, benevolent and charitable institutions and organizations, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to such property, or to the income thereof, other than to or for the use of a father, mother, husband, wife, children, brother or sister, or lineal descendants born in lawful wedlock, or the wife or widow of a son, or the husband of a daughter, shall be subject to a tax of five dollars on every hundred dollars of the clear market value of such property, to be paid to the treasurer of the state of New Jersey for the use of the state, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed; provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax.

2. And be it enacted, that when any person shall bequeath or devise, convey, grant, sell or give as aforesaid any property, or interest therein, or income therefrom, to a father, mother, husband, wife, children, brother or sister, the widow of a son, or a lineal descendant, during life or for a term of

years, and the remainder to a collateral heir of the decedent, or to a stranger in blood, or to a body politic or corporate, the property so passing shall be appraised immediately after the death of said testator or grantor, as the case may be, at what shall then be the fair market value thereof, in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax prescribed by this act on the remainder shall be immediately due and payable to the treasurer of the state of New Jersey, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided, that the person or persons, or body politic or corporate beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, or, and in that case, such person or persons, or body politic or corporate, shall give a bond to the state of New Jersey in a penalty three times the amount of the tax arising upon personal estate, with such sureties as the chancellor may approve, conditioned for the payment of said tax and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the clerk in chancery; provided further, that such person shall make a full verified return of such property to the chancellor of the state and file the same in the office of the clerk in chancery within one year from the death of the decedent, and within that period enter into such security and renew the same every five years.

3. And be it enacted, that whenever a decedent appoints or names one or more executors or trustees, and makes a bequest or devise of property to them in lieu of their commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to said tax, and the chancellor or the orphans' court having jurisdiction in the case shall fix such compensation.

4. And be it enacted, that all taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the testator, grantor or intestate, as the case may be, and if the same are paid within one year, interest at the rate of six per centum per annum shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected

from the time said tax accrued; provided, that if said tax is paid within nine months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of five per centum shall be allowed and deducted from said tax; and in all cases where the executors, administrators or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond, in the form and to the effect prescribed in section two of this act, for the payment of said tax, together with interest.

5. And be it enacted, that the penalty of ten per centum per annum imposed by section four hereof for the non-payment of said tax shall not be charged, where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of a year from the death of the decedent, and in such cases only six per centum per annum shall be charged upon the said tax from the expiration of such year until the cause of such delay is removed.

6. And be it enacted, that any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee, and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of such legacy might be enforced; if, however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of his accounts, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

7. And be it enacted, that all executors, administrators and trustees shall have full power to sell so much of the

property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

8. And be it enacted, that any sum of money retained by any executor, administrator or trustee, or paid into his hands for any tax or any property, shall be paid by him, within thirty days thereafter, to the treasurer of the state of New Jersey; and the said treasurer shall deliver a receipt of such payment to the comptroller of the state, whose duty it shall be to countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts, but an executor, administrator or trustee shall not be entitled to credit in his accounts, nor to be discharged from liability for such tax unless he shall produce a receipt so countersigned by the comptroller, or a copy thereof certified by him.

9. And be it enacted, that whenever any of the real estate of which any decedent may die seized shall pass to any body, politic or corporate, or to any person other than the father, mother, husband, wife, lawful issue, brother or sister, wife or widow of a son, or husband of a daughter, or in trust for them, or some of them, it shall be the duty of the executors, administrators or trustees of such decedent to give information thereof in writing to the comptroller of the state within six months after they undertake the execution of their respective duties, or, if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

10. And be it enacted, that whenever any debts shall be proven against the estate of a decedent, after the payment of legacies or distribution of property from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the state treasurer, or by them if it has been so paid.

11. And be it enacted, that whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state, standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the state treasurer on the transfer thereof, otherwise the corporation permitting such



transfer shall become liable to pay such tax; provided, that such corporation has knowledge before such transfer that said stocks or loans are liable to said tax.

12. And be it enacted, that when any amount of said tax shall have been paid erroneously to the state treasurer, it shall be lawful for the comptroller of the treasury, on satisfactory proof rendered to him of such erroneous payments, to draw his warrant on the state treasurer, in favor of the executor, administrator, person or persons who have paid any such tax in error, or who may be lawfully entitled to receive the same, for the amount of such tax so paid in error; provided, that all such applications for the repayment of such tax, shall be made within two years from the date of such payment.

13. And be it enacted, that in order to fix the value of property of persons whose estates shall be subject to the payment of said tax, the surrogate or register of the prerogative court, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and whenever occasion may require, whose duty it shall be forthwith to give such notice by mail, and to such persons as the surrogate or register of the prerogative court may by order direct, of the time and place he will appraise such property, and at such time and place to appraise the same at its fair market value, and make a report thereof in writing to said surrogate or register of the prerogative court, together with such other facts in relation thereto as said surrogate or register of the prerogative court may by order require, to be filed in the office of such surrogate or register of the prerogative court, and from this report the said surrogate or register of the prerogative court shall forthwith assess and fix the then cash value of all estates, annuities and life estates, or term of years growing out of said estates, and the tax to which the same is liable, and shall immediately give notice thereof by mail to the state comptroller and to all parties known to be interested therein; any person or persons dissatisfied with said appraisalment or assessment may appeal therefrom to the ordinary or orphans' court of the proper county, within sixty days after the making and filing of such assessment, on paying or giving security, approved by the ordinary or orphans' court, to pay all costs, together with whatever tax shall be fixed by said court; the said appraiser shall be paid by the state treasurer on the warrant of the comptroller, on the certificate of the ordinary or surrogate, duly filed with the

comptroller, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary travelling expenses.

14. And be it enacted, that any appraiser appointed by virtue of this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and imprisoned not exceeding ninety days; and in addition thereto the register of the prerogative court or surrogate shall dismiss him from such service.

15. And be it enacted, that the ordinary or the orphans' court in the county in which the real property is situate of a decedent who was not a resident of the state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act.

16. And be it enacted, that if it shall appear to the register of the prerogative court or surrogate that any tax accruing under this act has not been paid according to law, such officer shall issue a citation citing the persons interested in the property liable to the tax to appear before the ordinary or orphans' court on a day certain, not more than three months after the date of such citation, and show cause why said tax should not be paid; the service of such citation and the time, manner and proof thereof and fees therefor, and the hearing and determination thereon, and the enforcement of the determination or decree shall conform to the provisions of the law for the service of citations now issued by the ordinary or orphans' court, and the hearing and determination thereon and its enforcement; and the register of the prerogative court or surrogate shall, upon the request of any prosecutor of the pleas or the state comptroller, furnish one or more transcripts of such decree, and the same may be by them docketed and filed by the county clerk of any county in the state, and the same shall have the same effect as a lien by judgment.

17. And be it enacted, that whenever the state comptroller shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax to pay the same,

he shall notify the prosecutor of the pleas of the proper county, in writing, of such failure to pay such tax, and the prosecutor of the pleas so notified, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding before the ordinary of the orphans' court in the proper county, as provided in section sixteen of this act, for the enforcement and collection of such tax; all costs awarded by such decree to such prosecutor that may be collected after the collection and payment of the tax to the state treasurer, may be retained by the prosecutor of the pleas for his own use.

18. And be it enacted, that the register of the prerogative court, the surrogate, and the register of deeds or county clerk of each county shall every three months make a statement, in writing, to the state comptroller of the property from which or the party from whom he has reason to believe a tax under this act has become due since his last report.

19. And be it enacted, that whenever the surrogate of any county, or the register of the prerogative court, shall certify to the state comptroller, that there was probable cause for issuing a citation and taking the proceedings specified in section sixteen of this act, the state treasurer shall pay, upon the warrant of the comptroller, to the proper officials all expenses incurred for the issuing and services of the citation and all other lawful disbursements that have not otherwise been paid.

20. And be it enacted, that the comptroller of the state shall furnish to the register of the prerogative court and to each surrogate a book in which he shall enter, or cause to be entered, the returns made by appraisers, the cash value of annuities, life estates and term of years, and other property fixed by him, and the tax assessed thereon, and the amounts of any receipts for payments thereon filed with him, which books shall be kept in the office of the register of the prerogative court or the surrogate as a public record, and shall furnish all other forms and blanks necessary for use in the proper enforcement of this law.

21. And be it enacted, that in addition to the fees above mentioned the fees of the surrogates for each county for the duties heretofore or hereafter to be performed by them in each estate under this act or any act heretofore passed shall be paid by the state treasurer upon the warrant of the comptroller, and shall not exceed the following rates: On all sums paid to the state treasurer, not exceeding three

thousand dollars, five per centum; if over three thousand dollars, three per centum on such excess.

22. And be it enacted, that any person or body politic or corporate shall be entitled to a receipt from the state treasurer, countersigned by the state comptroller, for the payment of any tax paid under this act, which receipt shall designate on what real property, if any, of which any decedent may have died seized, said tax has been paid and by whom paid, and whether or not it is in full of said tax, and said receipt may be recorded in the clerk's office of the county in which said property is situate, in a book to be kept by said clerk for such purpose, which shall be labeled "Collateral Tax."

23. And be it enacted, that all acts or parts of acts inconsistent with the provisions of this act are hereby repealed, except so far as herein re-enacted; but nothing in this repealer shall affect or impair the lien of any taxes heretofore assessed, or due and payable, or any remedies for the collection of the same, or to surrender any remedies, powers, rights, or privileges acquired by the state under any act heretofore passed, or to relieve any person or corporation from any penalty imposed by said acts; provided, however, that the exception in the first section hereof in favor of churches, hospitals, orphan asylums, public libraries, Bible and tract societies, and all religious, benevolent and charitable institutions and organizations, shall be construed and held to apply to any and all bequests, devises and legacies heretofore made, in trust or otherwise, to or in favor of such institutions, or any of them, in all cases where said tax shall not have been paid prior to the passage of this act.

24. And be it enacted, that this act shall take effect immediately.

Approved May 15, 1894.

### III. PENNSYLVANIA.

(a) LAWS 1887, No. 37, P. 79.

An act to provide for the better collection of collateral inheritance taxes.

**Designation of estates subject to the payment of collateral inheritance tax—Owners, executors, &c., only to be discharged by payment—Estates of less than \$250 not to be subject to tax.**

§ 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that all estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of this state, and all such estates situated in another state, territory, or country, when the person, or persons, dying seized thereof shall have their domicile, within this commonwealth, passing from any person, who may die seized or possessed of such estates, either by will, or under the intestate laws of this state, or any part of such estate, or estates, or interest therein, transferred by deed, grant, bargain, or sale, made or intended to take effect, in possession or enjoyment after the death of the grantor, or bargainer to any person, or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seized or possessed thereof, shall be and they are hereby made subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates, and at and after the same rate for any less amount, to be paid to the use of the commonwealth; and all owners of such estates, and all executors and administrators and their sureties shall only be discharged from liability for the amount of such taxes or duties, the settlement of which they may be charged with, by having paid the same over for the use aforesaid, as hereinafter directed: provided, that no estate which may be valued at a less sum than two hundred and fifty dollars shall be subject to the duty or tax.

**Executors, accepting bequests, &c., in lieu of commissions, to pay tax on amount above a fair compensation—Rate of, to be fixed by the court.**

§ 2. Where a testator appoints or names one or more executors and makes a bequest or devise of property to them, in lieu of their commissions or allowances, or appoints them his residuary legatees, and said bequests, devises, or residuary legacies exceed what would be a fair compensation for their services, such excess shall be subject to the payment of the collateral inheritance tax; the rate of compensation to be fixed by the proper courts having jurisdiction in the case.

**Persons entitled to reversionary interests need not pay tax nor be chargeable with interest thereon until actual possession is acquired—Tax to be assessed upon value at time possession begins—Tax may be paid before possession is had. Basis of assessment—Tax to remain a lien until paid—Return of personal estate—Security.**

§ 3. In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers, liable to the collateral inheritance tax, to take effect in possession, or come into actual enjoyment after the expiration of one or more life estates, or a period of years, the tax on such estate shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate, by the termination of the estates for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner as aforesaid: provided, that the owner shall have the right to pay the tax at any time prior to his coming into possession, and in such cases, the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years: and provided further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. And the owner of any personal estate shall make a full return of the same to the register of wills of the proper county within one year from the death of the decedent, and within that time enter into security for the payment of the tax to the satisfaction of such register; and in case of failure so to do, the tax shall be immediately payable and collectible.

**When discount of 5 per cent. is to be allowed—  
When interest of 12 per cent. to be charged—  
When only 6 per cent. interest—When interest  
need not exceed interest made by estate.**

§ 4. If the collateral inheritance tax shall be paid within three months after the death of the decedent, a discount of five per centum shall be made and allowed; and if the said tax is not paid at the end of one year from the death of the decedent, interest shall then be charged at the rate of twelve per centum per annum on such tax; but where from claims made upon the estate, litigation, or other unavoidable cause of delay, the estate of any decedent or a part thereof cannot be settled up at the end of the year from his or her decease, six per centum per annum shall be charged upon the collateral inheritance tax, arising from the unsettled part thereof, from the end of such year until there be default: provided further, that where real or personal estate withheld by reason of litigation or other cause of delay in manner aforesaid from the parties entitled thereto, subject to said tax, has not been, or shall not be productive to the extent of six per centum per annum, they shall not be compelled to pay a greater amount as interest to the commonwealth than they may have realized, or shall realize from such estate during the time the same has been or shall be withheld as aforesaid.

**Executors, &c., to deduct tax from pecuniary  
legacy or share—To demand payment on specific  
legacy—Money due state to be promptly paid.**

§ 5. The executor, or administrator, or other trustee, paying any legacy or share in the distribution of any estate, subject to the collateral inheritance tax, shall deduct therefrom at the rate of five dollars in every hundred dollars, upon the whole legacy or sum paid; or if not money, he shall demand payment of a sum, to be computed at the same rate, upon the appraised value thereof, for the use of the commonwealth; and no executor or administrator shall be compelled to pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or admin-

istrator shall be distributed, as is or may be directed by law; and every sum of money retained by any executor or administrator, or paid into his hands on account of any legacy or distributive share, for the use of the commonwealth, shall be paid by him without delay.

**Provision where legacy is given for limited period upon a condition or contingency.**

§ 6. If the legacy subject to collateral inheritance tax be given to any person for life, or for a term of years, or for any other limited period, upon a condition or contingency, if the same be money, the tax thereon shall be retained upon the whole amount; but if not money, application shall be made to the orphans' court having jurisdiction of the accounts of the executors or administrators to make apportionment, if the case requires it, of the sum to be paid by such legatees, and for such further order relative thereto as equity shall require.

**Rule where legacy is charged upon real estate.**

§ 7. Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee, before paying the same, shall deduct therefrom at the rate aforesaid, and pay the amount so deducted to the executor, and the same shall remain a charge upon such real estate until paid, and the payment thereof shall be enforced by the decree of the orphans' court, in the same manner as the payment of such legacy may be enforced.

**Duty of executors, &c., as regards real estate.**

§ 8. Whenever any real estate of which any decedent may die seized shall be subject to the collateral inheritance tax, it shall be the duty of executors and administrators to give information thereof to the register of the county, where administration has been granted, within six months after they undertake the execution of their respective duties, or if the fact be not known to them within that period, within one month after the same shall have come to their knowledge, and it shall be the duty of the owners of such estate, immediately upon the vesting of the estate, to give information thereof to the register having jurisdiction of the granting of administration.



**Executors, &c., to take receipts.**

§ 9. It shall be the duty of any executor or administrator, on the payment of collateral inheritance tax, to take duplicate receipts from the register, one of which shall be forwarded forthwith to the auditor-general, whose duty it shall be to charge the register receiving the money with the amount, and seal with the seal of his office, and countersign the receipt and transmit it to the executor or administrator, whereupon it shall be a proper voucher in the settlement of the estate; but in no event shall an executor or administrator be entitled to a credit in his account by the register, unless the receipt is so sealed and countersigned by the auditor-general.

**Foreign executors to pay tax on stocks.**

§ 10. Whenever any foreign executor, or administrator, or trustee, shall assign or transfer any stocks or loans in this commonwealth, standing in the name of the decedent, or in trust for a decedent, which shall be liable for the collateral inheritance tax, such tax shall be paid, on the transfer thereof, to the register of the county where such transfer is made; otherwise the corporation permitting such transfer shall become liable to pay such tax.

**When tax to be refunded for debts paid.**

§ 11. Whenever debts shall be proven against the estate of a decedent, after distribution of legacies from which the collateral inheritance tax has been deducted, in compliance with this act, and the legatee is required to refund any portion of a legacy, a proportion of the said tax shall be repaid to him by the executor or administrator, if the said tax has not been paid into the state or county treasury, or by the county treasurer, if it has been so paid.

**Appraiser, how appointed and duties of.**

§ 12. It shall be the duty of the register of wills of the county in which letters testamentary, or of administration, are granted, to appoint an appraiser as often as, and whenever occasion may require, to fix the valuation of estates which are, or shall be, subject to collateral inheritance tax, and it shall be the duty of such appraiser to make a fair and conscionable appraisement of such estates, and it shall further be the duty of such appraiser to assess and fix the cash

value of all annuities and life estates growing out of said estates, upon which annuities and life estates the collateral inheritance tax shall be immediately payable out of the estate at the rate of such valuation: Provided, that any person or persons not satisfied with said appraisement shall have the right to appeal, within thirty days, to the orphans' court of the proper county or city, on paying, or giving security to pay, all costs, together with whatever tax shall be fixed by said court, and upon such appeal said courts shall have jurisdiction to determine all questions of valuation, and of the liability of the appraised estate for such tax, subject to the right of appeal to the supreme court as in other cases.

### **Penalty for appraiser taking reward, &c.**

§ 13. It shall be a misdemeanor in any appraiser, appointed by the register to make any appraisement in behalf of the commonwealth, to take any fee or reward from any executor or administrator, legatee, next of kin, or heir of any decedent, and for any such offense the register shall dismiss him from such service, and upon conviction in the quarter sessions, he shall be fined not exceeding five hundred dollars, and imprisoned not exceeding one year, or both, or either, at the discretion of the court.

### **Returns made by appraiser to be recorded.**

14. It shall be the duty of the register of wills to enter in a book, to be provided at the expense of the commonwealth, to be kept for that purpose, and which shall be a public record the returns made by all appraisers under this act, opening an account in favor of the commonwealth against the decedent's estate, and the register may give certificate of payment of such tax from said record, and it shall be the duty of the register to transmit to the auditor-general, on the first day of each month, a statement of all returns made by appraisers during the preceding month, upon which the taxes remain unpaid, which statement shall be entered by the auditor-general in a book to be kept by him for that purpose. And whenever any such tax shall have remained due and unpaid for one year, it shall be lawful for the register to apply to the orphans' court, by bill or petition, to enforce the payment of the same, whereupon said court, having caused due notice to be given to the owner of the real estate charged with the tax, and to such other persons as may be

interested, shall proceed, according to equity, to make such decrees, or orders, for the payment of the said tax, out of such real estate, as shall be just and proper.

**On default of payment of tax, citation to issue to parties liable.**

§ 15. If the register shall discover that any collateral inheritance tax has not been paid over, according to law, the orphans' court shall be authorized to cite the executors or administrators of the decedent, whose estate is subject to the tax, to file an account or to issue a citation to the executors, administrators, or heirs, citing them to appear on a certain day and show cause why the said tax should not be paid, and when personal service cannot be had, notice shall be given for four weeks, once a week, in at least one newspaper published in said county, and if the said tax shall be found to be due and unpaid, the said delinquent shall pay said tax and costs. And it shall be the duty of the register, or of the auditor-general, to employ an attorney, of the proper county, to sue for the recovery and amount of such tax, and the auditor-general is authorized and empowered, in settlement of accounts of any register, to allow him costs of advertising and other reasonable fees and expenses incurred in the collection of taxes.

**Registers of wills, compensations.**

§ 16. The register of wills, of the several counties of this commonwealth, upon their filing with the auditor-general the bond hereafter required, shall be the agents of the commonwealth for the collection of the collateral inheritance tax; and for services rendered in collecting and paying over the same the said agents shall be allowed to retain for their own use five per centum upon the collateral inheritance tax collected, if the said tax shall amount to a sum less than two hundred thousand dollars in any year; or four per centum upon the said tax, if the same shall amount to two hundred thousand dollars and less than three hundred thousand dollars in any year; or three per centum upon the said tax, if the tax collected shall amount to three hundred thousand dollars or more in any year; provided further, that this section shall not apply to the fees of the registers elected prior to the passage of this act. [As amended May 14, 1891; Laws Pa. 1891, p. 59.]

**To give bond.**

§ 17. The said register shall give bond to the commonwealth in such penal sum as the orphans' court of the county may direct, with two, or more, sufficient sureties for the faithful performance of the duties hereby imposed and for the regular accounting and paying over of the amounts to be collected and received, and said bond, on its execution and approval, by the said orphans' court, to be forwarded to the auditor-general.

**County treasurer, when to collect tax.**

§ 18. Until bond and security be given, as required by the preceding section, the said collateral inheritance tax shall be received and collected by the county treasurer as heretofore, and in such cases all the provisions of this act, relating to collection and payment by registers, shall apply to the county treasurer.

**Register to make quarterly returns.**

§ 19. It shall be the duty of the register of wills, of each county, to make returns and payment to the state treasurer of all the collateral inheritance taxes he shall have received; stating for what estate paid, on the first Mondays of April, July, October and January, in each year, and for all taxes collected by him and not paid over within one month, after his quarterly return of the same, he shall pay interest at the rate of twelve per centum per annum until paid.

**Tax to remain a lien until paid.**

§ 20. The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied: provided, that the said lien shall be limited to the property chargeable therewith: and provided further, that all collateral inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid and cease to be a lien as against any purchasers of real estate: and provided further, that all taxes due and legally demandable at the date of the passage of this act, the collection of which would be barred by the provisions hereof, shall not be barred if suit shall be brought therefor within one year from the date of the passage of this act.

§ 21. All laws, or parts of laws, heretofore approved, relating to the collection of the collateral inheritance tax, and inconsistent herewith, be and the same are hereby repealed.

Approved May 6, 1887.

(b) No. 243, LAWS 1895, P. 325.

An act, fixing the compensation of appraisers appointed by the registers of wills of the several counties to appraise the value of estates subject to the payment of collateral inheritance tax, and of experts employed to assist such appraisers.

**Compensation of appraisers—Traveling expenses allowed—Sworn statement of expenses.**

§ 1. Be it enacted, &c., that from and after the passage of this act, the compensation of appraisers appointed by the registers of wills of the several counties of the commonwealth to fix the value of estates which are or may hereafter be subject to collateral inheritance tax shall be as follows, namely: For each and every day on which an appraiser shall actually be engaged in making appraisement of property subject to said tax, he shall receive the sum of two dollars; provided, that if, in the discharge of his duties, it shall be necessary for him, the said appraiser, to travel from his place of residence to appraise property subject to said tax, he shall be allowed such actual necessary traveling expenses as he may incur, which expenses shall be itemized in a sworn statement to be returned to the register and subject to the final approval of the auditor general.

**Expert appraiser may be appointed when necessary—Additional compensation may be allowed expert—Appraiser may employ expert to assist him—Register of wills must certify to auditor general that expert appraiser is necessary or that an expert assistant is necessary—Auditor general must approve appointments—Itemized statement of services performed, etc., must be rendered to auditor general—Clerk in office of register of wills shall not be appointed as expert.**

§ 2. It is hereby further provided and enacted that when, by virtue of the complicated nature of an estate subject to

the payment of collateral inheritance tax, the interest of the commonwealth shall require the appointment, as appraiser of said estate, of a person possessed of expert or technical knowledge to ascertain the value thereof, reasonable additional compensation shall be allowed said appraiser for the exercise of such expert or technical knowledge, and in cases where, after the appointment of an appraiser to appraise the value of an estate subject to the payment of collateral inheritance tax, it shall appear that the proper appraisal of said estate will require the services of a person possessed of expert or technical knowledge whereof the appraiser appointed to appraise said estate is not possessed, he, the said appraiser, may employ the services of a person possessed of expert or technical knowledge to assist him in the appraisement of said estate, and for such services the person so employed shall receive reasonable compensation: provided, that in all such cases the register of wills appointing the appraiser shall certify to the auditor general, that there is actual necessity for the appointment of an appraiser possessed of expert or technical knowledge, or that the appraiser already appointed to appraise the estate in question should be assisted by a person possessed of such knowledge, and no person shall be appointed as such expert appraiser, or as expert assistant to an appraiser, without the approval of the auditor general of said appointment first had and obtained, nor shall any payment be made to any appraiser, or to any person employed by him, under this section, until an itemized statement of the services performed and the compensation recommended shall have been rendered, under oath or affirmation, to the auditor general for his approval and shall have received the same: and provided further, that no clerk or other person employed in the office of a register of wills shall be appointed an expert appraiser of an estate subject to the payment of collateral inheritance tax, nor as an expert to assist the appraiser of such estate.

Approved the 26th day of June, A. D. 1895.

#### IV. MASSACHUSETTS.

(a) CHAPTER 425, LAWS 1891, WITH AMENDMENTS TO 1895.

An act imposing a tax on collateral legacies and successions.  
Be it enacted, etc., as follows:

##### **Tax imposed on collateral legacies and successions.**

§ 1. All property within the jurisdiction of the commonwealth, and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the commonwealth regulating intestate succession, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter of a decedent, or to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation, shall be subject to a tax of five per centum of its value, for the use of the commonwealth; and all administrators, executors and trustees, and any such grantee, under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same have been paid as hereinafter directed; provided, however, that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars.

##### **Property bequeathed to direct heir for term of years.**

§ 2. When any person bequeaths or devises any property to or for the use of father, mother, husband, wife, lineal descendant, brother, sister, an adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, during life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall, within three months after the date of giving bond by the executor, ad-

ministrator or trustee, be appraised in the manner herein-after provided, and deducted from the appraised value of such property, and the remainder shall be subject to a tax of five per centum of its value.

**Property, in excess of reasonable compensation, bequeathed to executors, etc.**

§ 3. Whenever a decedent appoints one or more executors or trustees, and in lieu of their allowance makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the probate court having jurisdiction of their accounts, upon the application of any one interested or the treasurer of the commonwealth, shall fix such compensation.

**Taxes payable to the treasurer of the commonwealth.**

§ 4. All taxes imposed by this act shall be payable to the treasurer of the commonwealth by the executors, administrators or trustees, at the expiration of two years from the date of their giving bond; provided that whenever legacies or distributive shares are paid within the two years, the taxes thereon shall be payable at the time the same are paid.

In case, however, where the probate court has ordered the executor or administrator to retain the funds to satisfy a claim of a creditor whose right of action for which does not accrue within the two years, the payment of the tax may be suspended by an order of the court to await the disposition of such claim. If the taxes are not paid when due, interest at the rate of six per cent. per annum shall be charged and collected from the time the same became due; and the taxes and interest that may accrue on the same shall be and remain a lien on the property subject to the taxes till the same are paid to the commonwealth.

[As amended by chapter 430, Laws 1895.]

**Administrator, &c., to collect the tax.**

§ 5. Any administrator, executor or trustee having in charge or trust, any property subject to said tax, shall deduct the tax therefrom, or shall collect the tax thereon, from the legatee or person entitled to said property, and he



shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.

**Tax to be deducted when legacies are charged upon real estate, &c.**

§ 6. Whenever any legacies, subject to said tax are charged upon or payable out of, any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom, and pay it to the executor, administrator or trustee, and the same shall remain a charge upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator and trustee, in the same manner as the payment of the legacy itself could be enforced.

**Tax to be retained when money is given for a limited period, &c.**

§ 7. If any such legacy is given in money to any person for a limited period, such administrator, executor or trustee shall retain the tax on the whole amount; and if it is not in money, he shall make an application to the court having jurisdiction of his accounts to make an apportionment, if the case requires it, of the sum to be paid into his hands by such legatee on account of said tax, and for such further orders as the case may require.

**Real estate may be sold for payment of the tax.**

§ 8. The probate court may authorize administrators, executors and trustees to sell real estate of one deceased for the payment of said tax, in the same manner as administrators and executors may be authorized to sell real estate for the payment of debts.

**Inventory to be filed within 3 months.**

§ 9. An inventory of every estate, any part of which may be subject to a tax under the provisions of this act, shall be filed by the executor, administrator or trustee, within three months from his appointment and qualification. In case such executor, administrator or trustee neglects or refuses to file such inventory as above required, he shall be liable to a penalty of not more than one thousand dollars, and the treasurer of the commonwealth may, when in his judgment the interests of the commonwealth require, commence in his

own name appropriate proceedings against such executor, administrator or trustee for the recovery of such penalty; and it shall be the duty of the several registers of probate to notify the treasurer of the commonwealth, within thirty days of the expiration of the said three months, of any such neglect or refusal which may occur in their respective counties.

[As amended, Laws 1895, c. 430.]

### **Copy of inventory to be mailed to the treasurer of the commonwealth.**

§ 10. A copy of the inventory of every estate, any part of which may be subject to a tax under the provisions of this act, or if the same can be conveniently separated, then a copy of the inventory of such part of such estate, with the appraisal thereof, shall be sent by mail, by the register of the probate court in which such inventory is filed, to the treasurer of the commonwealth within thirty days after the same is filed. The fees for such copy shall be paid by the treasurer of the commonwealth.

### **Treasurer of commonwealth to be informed when real estate becomes subject to tax.**

§ 11. Whenever any of the real estate of a decedent shall so pass to another person as to become subject to said tax, the executor, administrator or trustee of the decedent shall inform the treasurer of the commonwealth thereof within six months after he has assumed the duties of his trust or if the fact is not known to him within that time, then within one month from the time when the fact becomes known to him.

### **Tax to be refunded when wrongfully paid.**

§ 12. Whenever, for any reason, the devisee, legatee or heir, who has paid any such tax, afterwards refunds any portion of the property on which it was paid, or it is judicially determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part of said tax shall be paid back to him by the executor, administrator or trustee.

### **To be assessed on market value of property.**

§ 13. The value of such property as may be subject to said tax shall be its actual value, as found by the probate, but

the treasurer of the commonwealth, or any person interested in the succession to said property, may apply to the probate court having jurisdiction of the estate, and on such application said court shall appoint three disinterested persons who, being first sworn, shall appraise such property at its actual market value, for the purposes of said tax, and shall make return thereof, to said court, which return may be accepted by said court; and if so accepted it shall be binding upon the person by whom the tax is to be paid, and upon the commonwealth. And the fees of the appraiser shall be fixed by the judge of probate and paid by the treasurer of the commonwealth.

### **Value of an annuity or life estate.**

In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and four per cent. compound interest.

### **Court to have jurisdiction to determine all questions relating to tax.**

§ 14. The probate court having jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy or inheritance under this act, subject to appeal as in other cases, and the treasurer of the commonwealth shall represent the interests of the commonwealth in any such proceedings.

### **Administration of estate liable to tax when will, etc., is not offered for probate within four months.**

§ 15. If, upon the decease of any person leaving an estate liable to a tax under the provisions of this act, a will disposing of such estate is not offered for probate, or an application for administration made within four months from the time of such decease, the treasurer of the commonwealth may make application to the proper probate court, setting forth such fact and praying that an administrator may be appointed, and thereupon said court shall appoint an administrator to administer upon such estate.

### **Final settlement not to be allowed until all taxes have been paid.**

§ 16. No final settlement of the account of any executor, administrator or trustee, shall be accepted or allowed by any

probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this act upon any property or interest therein, belonging to the estate to be settled by said account, have been paid; and the receipt of the treasurer of the commonwealth for such tax, but in case such tax has been paid to a county treasurer as hereinbefore provided, then such officer's receipt shall be the proper voucher for such payment.

### **Words "person" and "property" defined.**

§ 17. In the foregoing sections the word "person" shall include the plural as well as the singular, and artificial as well as natural persons; the word "property" shall include both real and personal estate, and any forms of interest therein whatsoever, including annuities.

### **Treasurer may bring suit for recovery of taxes unpaid.**

§ 18. The treasurer of the commonwealth shall, within six months after the same shall be due and payable, bring suit in his own name for the recovery of all taxes remaining unpaid, and shall also bring such suit when the judge of a probate court shall certify to him that a final account of any executor, administrator or trustee has been filed in said court, and that the final settlement of such estate is delayed by reason of the nonpayment of such tax, and such certificate shall issue upon the application of any heir, legatee, or any person in interest; provided, however, that the probate court may extend the time when any tax shall be due and payable whenever the circumstances of the case may require.

Approved June 11, 1891.

### **(b) CHAPTER 432, LAWS 1893.**

An act relating to the collection of taxes on collateral legacies and successions.

Be it enacted, etc., as follows:

§ 1. The treasurer and receiver general is authorized to expend a sum not exceeding one thousand dollars annually for extra clerical assistance in the assessment and collection of taxes on collateral legacies and successions, under chapter four hundred and twenty-five of the Acts of the Year Eighteen Hundred and Ninety One; and he may, if he deems

it best so to do, assign such portions of the work as can be performed by that officer without detriment to the public service, to the deputy sealer of weights and measures, to whom such compensation, in addition to his salary of deputy sealer of weights and measures, as the treasurer and receiver general may deem proper, may be paid from the amount herein authorized to be expended.

Approved June 9, 1893.

(c) LAWS 1895, CH. 307.

An act relative to taxes on collateral legacies and successions.

Be it enacted, etc., as follows:

§ 1. No bequest of a testator whose estate is subject to taxation under the provisions of chapter four hundred and twenty-five of the Acts of the Year 1891 shall be subject to the provisions of said chapter unless the value of such bequest exceeds the sum of \$500, nor shall bequests to towns, for any public purpose, be subject to a tax under the provisions of said chapter.

§ 2. This act shall take effect upon its passage.

Approved April 25, 1895.

## V. MAINE.

(a) LAWS 1893, CH. 146, AS AMENDED BY CHAPTERS 96 AND 124, LAWS 1895.

### An act to tax collateral inheritances.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

§ 1. All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of the state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of the daughter of a decedent, or any educational, charitable, or benevolent institution in this state [as amended by chapter 96, Laws Me. 1895], shall be liable to a tax of two and a half per cent. of its value, above the sum of five hundred dollars, for the use of the state, and all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes, with lawful interest, as hereinafter provided, until the same shall have been paid as hereinafter directed.

§ 2. When any person shall bequeath or devise any property to or for the use of father, mother, husband, wife, lineal descendant, an adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood other than an educational, charitable or benevolent institution in this state the value of the prior estate shall, within three months after the appointment of the executor, be appraised in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property, and said tax on the remainder shall be payable within one year from the death of said testator, or within such further time as the judge of the probate may allow [Id.], and, together with any interest

that may accrue on the same, be and remain a lien on said property till paid to the state.

§ 3. Whenever a decedent appoints one or more executors or trustees, and in lieu of their allowance makes a bequest or devise of property to them, which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the court of probate having jurisdiction of their accounts shall determine what shall be such reasonable compensation.

§ 4. All taxes imposed by this act shall be payable to the treasurer of state by the executors, administrators or trustees within 30 days from the date of the decrees determining the amount thereof, and if the same are not so paid, interest at the rate of nine per cent. shall be charged them and collected from the time said tax became due.

§ 5. Any administrator, executor, or trustee, having in charge or trust any property subject to such tax, shall deduct the tax therefrom, or shall collect the tax thereon and interest chargeable under this act, from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.

§ 6. Whenever any legacies subject to said tax shall be charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, or trustee, and the same shall remain a charge upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, or trustee, in the same manner as the payment of the legacy itself could be enforced.

§ 7. If any such legacy be given in money to any person for a limited period, such administrator, executor, or trustee shall retain the tax on the whole amount; but if it be not in money, he shall make an application to the judge of probate having jurisdiction of his accounts to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatee on account of said tax and for such further order as the case may require.

§ 8. All administrators, executors and trustees shall have power to sell so much of the estate of the deceased as will enable them to pay said tax in the same manner as they may be empowered to do for the payment of his debts.

§ 9. A copy of the inventory of every estate, any part of

which may be subject to a tax under the provisions of this act, or if the same can be conveniently separated, then a copy of such part of such inventory, with the appraisal thereof, shall be sent by mail by the register or the judge of the court of probate in which such inventory is filed, to the state assessors within ten days after the same is filed. The fees for such copy shall be paid by the executor, administrator, or trustee, and allowed in his account.

§ 10. Whenever any of the real estate of a decedent shall so pass to another person as to become subject to said tax, the executor, administrator, or trustee of the decedent shall inform the state assessors thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month after it does become so known to him.

§ 11. Whenever for any reason the devisee, the legatee or heir who has paid any such tax shall refund any portion of the property on which it was paid, or it shall be judicially determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part of said tax, shall be paid back to him by the executor, administrator, or trustee.

§ 12. The value of such property as may be subject to said tax shall be its actual market value as found by the judge of probate after public notice or personal notice to the state assessors and all persons interested in the succession to said property, or the state assessors or any of said persons interested may apply to the judge of probate having jurisdiction of the estate, and on such application the judge shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of said tax, and shall make return thereof to said probate court, which return may be accepted by said court in the same manner as the original inventory of such estate is accepted, and if so accepted it shall be binding upon the person by whom this tax is to be paid and upon the state. And the fees of the appraisers shall be fixed by the judge of probate and paid by the executor, administrator or trustee. In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent. compound interest. [As amended by chapter 96, Laws 1895, § 6.]

§ 13. The court of probate, having either principal or ancillary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all



questions in relation to said tax that may arise affecting any devise, legacy or inheritance under this act, subject to appeal as in other cases, and the county attorney of the county where the hearing is had, shall represent the interests of the state in any such proceedings. The judge of probate having jurisdiction as aforesaid, shall fix the time and place for hearing and determining such questions, and shall give public notice thereof and personal notice to the executor, administrator or trustee. Appeals on behalf of the estate shall be taken in the name of the executor, administrator or trustee, and service upon the county attorney of the county where the hearing is had shall be sufficient. Where appeals are taken by the state, service shall be made upon the executor, administrator or trustee. [As amended by Laws 1895, c. 124.]

§ 14. Every judge of probate shall, as often as once in six months, render to the state assessors a statement of the property within the jurisdiction of his court that has become subject to said tax during such period, the name of the testator, intestate or grantor, and the name of the beneficiary whose estate is so taxable, and amount of such taxes as will accrue during the next six months, so far as the same can be determined from the probate records, and the number and amount of such taxes as are due and unpaid. [Repealed by chapter 96, Laws 1895, § 7.]

§ 15. The fees of judges or registers of probate for the duties required of them by this act shall be, for each order, appointment, decree, judgment, or approval of appraisal of report required hereunder, fifty cents, and for copies of records, the fees that are now allowed by law for the same. And the administrators, executors, trustees, or other persons paying said tax shall be entitled to deduct the amount of all such fees paid to the judge or register of probate from the amount of said tax to be paid to the treasurer of state.

§ 16. No final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed by any judge of probate unless it shall show, on oath or the affirmation of the accountant, and the judge of said court shall find, that all taxes, imposed by the provisions of this act, upon any property or interest therein, belonging to the estate to be settled by said account, shall have been paid, and the receipt of the treasurer of state for such tax shall be the proper voucher for such payment.

§ 17. In the foregoing sections relating to collateral inheritances the word "person" shall be construed to include

bodies corporate as well as natural persons; the word "property" shall be construed to include both real and personal estate and any form of interest therein whatsoever, including annuities.

§ 18. This act shall not apply to any case now pending in the probate court, and shall take effect when approved.

Approved February 9.

(b) CHAPTER 96, LAWS 1895, § 9.

§ 9. After failure to pay such tax, as provided in said act, such an administrator, executor or trustee is liable to the state on his administration bond for such tax and interest, and an action shall lie thereon without the authority of the judge of probate; or an action of debt may be maintained in the name of the state against any such administrator, executor or trustee or any such grantee for such tax and interest. But if such administrator, executor or trustee, after being duly cited therefor, refuses or neglects to return his inventory, or to settle an account, by reason whereof the judge of probate cannot determine the amount of such tax, such administrator, executor or trustee shall be liable to the state on his administration bond for all damages occasioned thereby.

## VI. OHIO.

(a) LAWS 1893, P. 14, AS AMENDED BY LAWS 1894, P. 169.

An act imposing a collateral-inheritance tax.

Passed January 27, 1893, and amended April 20, 1894.

Section 1. Be it enacted by the general assembly, &c., as follows:

§ 1. That all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of section 4182 of the Revised Statutes of Ohio, or the lineal descendant thereof, or the lineal descendant of any adopted child, the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of five per centum of its value, above the sum of two hundred dollars, seventy-five per centum of such tax to be for the use of the state, and twenty-five per centum for the use of the county wherein the same is collected; and all administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property, and be and remain a lien until paid. [As amended April 20, 1894.]

§ 2. When any person shall bequeath or devise any property to or for the use of father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant and adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall, within sixty days after the death of the tes-

tator, be appraised in the manner hereinafter provided, and deducted, together with the sum of two hundred dollars, from the appraised value of such property. [As amended April 20, 1894.]

§ 3. Whenever a decedent appoints one or more executors or trustees, and in lieu of their allowance makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises, or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the court of probate having jurisdiction of their accounts shall fix such compensation.

§ 4. All taxes imposed by this act shall be paid into the county treasury of the county in which the court having jurisdiction of the estate or accounts is situated by the executors, administrators or trustees, or other persons charged with the payment thereof, and if said taxes are not paid within one year after the death of said decedent, interest at the rate of eight per centum shall be thereafter charged and collected thereon, and if said taxes are not paid at the expiration of eighteen months after the death of said decedent, it shall be the duty of the prosecuting attorney of the county wherein said taxes remain unpaid, to institute the necessary proceedings to collect the same in the court of common pleas of such county, after first being duly notified in writing by the probate judge of said county of the non-payment of such taxes, and it is hereby made the duty of the probate judge to give such notice in writing; but if said taxes are paid before the expiration of one year after the death of said decedent, a discount at the rate of one per centum per month for each full month that payment shall have been made prior to the expiration of said year, shall be allowed on the amount of taxes found to be due under the provisions of this act. [As amended April 20, 1894.]

§ 5. Any administrator, executor, or trustee, having in charge or trust any property subject to such tax, shall deduct the tax therefrom, or shall collect the tax thereon from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.

§ 6. Whenever any legacies subject to said tax shall be charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, or trustee,

and the same shall remain a charge upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, or trustee, in the same manner as the payment of the legacy itself could be enforced.

§ 7. If any such legacy be given in money to any person for a limited period, such administrator, executor or trustee shall retain the tax on the whole amount; but if it be not in money, he shall make an application to the court having jurisdiction of his accounts to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatee on account of said tax and for such further order as the case may require.

§ 8. All administrators, executors and trustees shall have power to sell so much of the estate of the deceased as will enable them to pay said tax in the same manner as they may be empowered to do for the payment of his debts.

§ 9. Within ten days after the filing of the inventory of every such estate, any part of which may be subject to a tax under the provisions of this act, the judge or the court of probate in which such inventory is filed, shall make and deliver to the county auditor of any such county, a copy of such inventory; or, if the same can be conveniently separated, a copy of such part of such estate, with the appraisal thereof; the county auditor shall certify the value of said estate, subject to taxation hereunder and the amount of taxes due therefrom, to the county treasurer, who shall collect such taxes, and thereupon place twenty-five per centum thereof to the credit of the county expense fund of said county, and pay seventy-five per centum thereof into the state treasury, to the credit of the general revenue fund, at the time of making his semi-annual settlement. [As amended April 20, 1894.]

§ 10. Whenever any of the real estate of a decedent shall so pass to another person as to become subject to said tax, the executor, administrator or trustee of the decedent shall inform the probate judge thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month from the time that it does become so known to him.

§ 11. Whenever for any reason the devisee, legatee or heir who has paid any such tax shall refund any portion of the property on which it was paid, or it shall be judicially determined that the whole or any [part of] such tax ought not to have been paid, said tax, or the due proportional part of said tax, shall be paid back to him by the executor, administrator or trustee.

§ 12. The value of such property as may be subject to said tax shall be its actual market value as found by the court of probate; but the state, through the prosecuting attorney of the proper county, or any person interested in the succession to said property, may apply to the court of probate having jurisdiction of the estate; and on such application the court shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of said tax, and shall make return thereof to said court, which return may be accepted by said court in the same manner as the original inventory of such estate is accepted, and if so accepted it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the judge of probate and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and five per centum compound interest.

§ 13. The court of probate having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise, affecting any devise, legacy or inheritance under this act, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in any such proceedings.

§ 14. The judge of each probate court shall, as often as once in six months, render to the county auditor a statement of the property within the jurisdiction of his court that has become subject to said tax during such period, the number and amount of such taxes as will accrue during the next six months, so far as the same can be determined from the probate records, and the number and amount of such taxes as are due and unpaid; and each probate judge shall keep a separate record, in a book to be provided for that purpose, of all cases arising under the provisions of this act. [As amended April 20, 1894.]

§ 15. The fees of all officers having duties to perform under the provisions of this act, shall be paid by the county from the county expense fund thereof, and shall be the same as now allowed by law for similar services; in the calculation of amounts due the state, seventy-five per centum of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes, shall be charged to the state and deducted from the amount

of taxes to be paid into the state treasury. [As amended April 20, 1894.]

§ 16. No final settlement of the account of any executor, administrator or trustee shall be accepted or allowed by the court of probate unless it shall show, and the judge of said court shall find, that all taxes imposed by the provisions of this act upon any property or interest therein, belonging to the estate to be settled by said account, shall have been paid; and the receipt of the county treasurer shall be the proper voucher for such payment.

§ 17. In the foregoing act the word "person" shall be construed to include the plural as well as the singular, and artificial as well as natural persons; the word "property" shall be construed to include both real and personal estate, and any form of interest therein whatsoever, including annuities.

§ 18. This act shall take effect and be in force from and after its passage.

(b) LAWS 1894, P. 166.

An act to impose a direct-inheritance tax.

Passed April 20, 1894.

§ 1. Be it enacted by the general assembly of the state of Ohio, that all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, including annuities, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of section 4182 of the Revised Statutes of Ohio, or the lineal descendant thereof, the lineal descendant of any adopted child, the wife or widow of a son, the husband of a daughter of decedent, or to any one in trust for such person or persons, shall be liable to a tax as follows, to wit: When the value of the entire property of such decedent exceeds the sum of twenty thousand dollars and does not exceed the sum of fifty thousand dollars, one per cent.; when it exceeds fifty thousand dollars and does not exceed one hundred thousand dollars, one and one-half per cent.; when it exceeds one hundred thou-

sand dollars and does not exceed two hundred thousand dollars, two per cent.; when it exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars, three per cent.; when it exceeds three hundred thousand dollars and does not exceed five hundred thousand dollars, three and one-half per cent.; when it exceeds five hundred thousand dollars and does not exceed one million dollars, four per cent; and when it exceeds one million dollars, five per cent.; seventy-five per cent of such tax to be for the use of the state, and twenty-five per cent. for the use of the county wherein the same is collected; and all administrators, executors and trustees, shall be liable for all such taxes, with lawful interest, as hereinafter provided, until the same shall have been paid as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property.

§ 2. All taxes imposed by this act shall be paid into the county treasury of the county in which the court having jurisdiction of the estate or accounts is situated, by the executors, administrators or trustees, or other persons charged with the payment thereof, and if said taxes are not paid within one year after the death of said decedent, interest at the rate of eight per centum shall be thereafter charged and collected thereon; and if said taxes are not paid at the expiration of eighteen months after the death of said decedent, it shall be the duty of the prosecuting attorney of the county wherein said taxes remain unpaid, to institute the necessary proceedings to collect the same in the court of common pleas of such county, after first being duly notified in writing by the probate judge of said county of the non-payment of such taxes, and it is hereby made the duty of the probate judge to give such notice in writing; but if said taxes are paid before the expiration of one year after the death of said decedent, a discount at the rate of one per cent. per month for each full month that payment shall have been made prior to the expiration of said year, shall be allowed on the amount of taxes found to be due under the provisions of this act.

§ 3. Any administrator, executor or trustee having in charge or trust any property subject to such tax, shall deduct the tax therefrom, or shall collect the tax thereon from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property, subject to said tax, to any person until he has collected the tax thereon.



§ 4. Whenever any legacies subject to said tax shall be charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator or trustee, and the same shall remain a lien upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator or trustee, in the same manner as the payment of the legacy itself could be enforced.

§ 5. All administrators, executors and trustees shall have power to sell so much of the estate of the deceased as will enable them to pay said tax, in the same manner as they may be empowered to do for the payment of his debts.

§ 6. Within ten days after the filing of the inventory of every estate subject to a tax under the provisions of this act, the judge or the court of probate in which such inventory is filed, shall make and deliver to the county auditor of any such county, a copy of such inventory, with the appraisal of said estate; the county auditor shall certify the value of said estate and the amount of taxes due therefrom to the county treasurer, who shall collect such taxes and thereupon place twenty-five per cent. thereof to the credit of the county expense fund of said county, and pay seventy-five per cent thereof into the state treasury, to the credit of the general revenue fund, at the time of making his semi-annual settlement.

§ 7. Whenever any of the real estate of a decedent shall so pass to another person as to become subject to said tax, the executor, administrator or trustee of the decedent shall inform the probate judge thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month from the time that it does become so known to him.

§ 8. Whenever for any reason the devisee, legatee or heir who has paid any such tax shall refund any portion of the property on which it was paid, or it shall be judicially determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part of said tax, shall be paid back to him by the executor, administrator or trustee.

§ 9. The value of such property as may be subject to said tax shall be its actual market value as found by the court of probate; but the state, through the prosecuting attorney of the proper county, or any person interested in the succession of [to] said property, may apply to the court of

probate having jurisdiction of the estate; and on such application the court shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of said tax, and shall make return thereof to said court, which return may be accepted by said court in the same manner as the original inventory of such estate is accepted, and if so accepted it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the judge of probate and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and five per centum compound interest.

§ 10. The court of probate, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise, affecting any devise, legacy or inheritance under this act, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in any such proceedings.

§ 11. The judge of each probate court shall, as often as once in six months, render to the county auditor a statement of the property within the jurisdiction of his court that has become subject to said tax during such period, the number and amount of such taxes as will accrue during the next six months, so far as the same can be determined from the probate records, and the number and amount of such taxes as are due and unpaid, and each probate judge shall keep a separate record, in a book to be provided for that purpose, of all cases and proceedings arising under the provisions of this act.

§ 12. The fees of all officers having duties to perform under the provisions of this act, shall be paid by the county from the county expense fund thereof, and shall be the same as now allowed by law for similar services. In the calculation of amounts due the state, seventy-five per cent. of the cost of collection, and other necessary and legitimate expenses incurred by the county in the collection of such taxes, shall be charged to the state and deducted from the amount of taxes to be paid into the state treasury.

§ 13. No final settlement of the account of any executor, administrator or trustee shall be accepted or allowed by

the court of probate unless it shall show, and the judge of said court shall find, that all taxes imposed by the provisions of this act upon any property or interest therein belonging to the estate to be settled by said account shall have been paid; and the receipt of the county treasurer shall be the proper voucher for such payment.

§ 14. This act shall take effect on its passage.

State of Ohio, Office of the Secretary of State:

I, Samuel M. Taylor, secretary of state of the state of Ohio, hereby certify that the foregoing are correct copies of the laws imposing taxes on collateral and direct inheritances, passed January 27, 1893, and April 20, 1894, and that the same are in full force and effect as general laws of this state.

[Seal.] Samuel M. Taylor, Secretary of State.

LAW INHER.—32

## VII. CONNECTICUT.

(a) LAWS 1889, P. 106, CH. CLXXX.

### An act imposing a collateral inheritance tax.

Be it enacted by the senate and house of representatives in general assembly convened:

#### Collateral inheritance tax imposed.

§ 1. All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, the husband of the daughter of a decedent, or some charitable purpose, or purpose strictly public within this state, shall be liable to a tax of five per centum of its value, above the sum of one thousand dollars, for the use of the state, and all administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed. [Brothers and sisters of decedent are now exempt. Chapter 257, Laws 1893, p. 406.]

#### Tax on remainderman, how ascertained.

§ 2. When any person shall bequeath or devise any property to or for the use of father, mother, husband, wife, lineal descendant, an adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, during life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall, within sixty days after the death of the testator, be appraised in the manner hereinafter provided, and deducted, together with the sum of one thousand dollars, from the appraised value of such prop-

erty, and the tax on the remainder shall be payable one year from the death of said testator, and together with any interest that may accrue on the same, be and remain a lien on said property till paid to the state.

### **On legacy to executor or trustee.**

§ 3. Whenever a decedent appoints one or more executors or trustees, and in lieu of their allowance makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the court of probate having jurisdiction of their accounts shall fix such compensation.

### **Tax, when payable.**

§ 4. All taxes imposed by this act shall be payable to the treasurer of the state by the executors, administrators or trustees, one year from the death of said testator, or intestate, or the qualification of said trustee; and if the same are not so paid, interest at the rate of nine per centum shall be charged them and collected from the time said tax became due.

### **Administrator to collect or retain tax.**

§ 5. Any administrator, executor or trustee having in charge or trust any property subject to said tax, shall deduct the tax therefrom, or shall collect the tax thereon from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.

### **Tax on legacy charge on real estate.**

§ 6. Whenever any legacies subject to said tax shall be charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator or trustee, and the same shall remain a charge upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator or trustee, in the same manner as the payment of the legacy itself could be enforced.

**Tax on estate for years.**

§ 7. If any such legacy be given in money to any person for a limited period, such administrator, executor or trustee, shall retain the tax on the whole amount; but if it be not in money, he shall make an application to the court having jurisdiction of his accounts to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatee on account of said tax, and for such further order as the case may require.

**Sale of estate to pay tax.**

§ 8. All administrators, executors and trustees shall have power to sell so much of the estate of the deceased as will enable them to pay said tax in the same manner as they may be empowered to do for the payment of his debts.

**Inventory of estate subject to tax to be sent state treasurer.**

§ 9. A copy of the inventory of every estate, any part of which may be subject to a tax under the provisions of this act, or if the same can be conveniently separated, then a copy of such part of such estate, with the appraisal thereof, shall be sent by mail, by the clerk or the judge of the court of probate in which such inventory is filed, to the treasurer of the state within ten days after the same is filed. The fees for such copy shall be paid by the executor, administrator or trustee.

**Duty of executor, &c., as to real estate becoming subject to tax.**

§ 10. Whenever any of the real estate of a decedent shall so pass to another person, as to become subject to said tax, the executor, administrator or trustee of the decedent shall inform the state treasurer thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month from the time that it does become so known to him.

**Refunding over-paid tax.**

§ 11. Whenever, for any reason, the devisee, legatee or heir who has paid any such tax shall refund any portion of the property on which it was paid, or it shall be judicially

determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part of said tax, shall be paid back to him by the executor, administrator or trustee.

### **Value of property, how ascertained.**

§ 12. The value of such property as may be subject to said tax shall be its actual value as found by the court of probate, but the state treasurer, or any person interested in the succession to said property, may apply to the court of probate having jurisdiction of the estate, and on such application said court shall appoint three disinterested persons who, being first sworn, shall view and appraise such property at its actual market value, for the purposes of said tax, and shall make return thereof to said court, which return may be accepted by said court in the same manner as the original inventory of such estate is accepted, and if so accepted it shall be binding upon the person by whom this tax is to be paid, and by the state. And the fees of the appraiser shall be fixed by the judge of probate and paid by the executor, administrator or trustee. In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and five per centum compound interest.

### **Jurisdiction of probate court as to questions relative to tax.**

§ 13. The court of probate having either principal or ancillary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy or inheritance under this act subject to appeal as in other cases, and the state treasurer shall represent the interests of the state in any such proceedings.

### **Statements to be rendered the treasurer by probate judges.**

§ 14. The judge of each probate district shall, as often as once in six months, render to the state treasurer a statement of the property within the jurisdiction of his court that has become subject to such tax during such period, the number and amount of such taxes as will accrue during the next six months, so far as the same can be ascertained from the

probate records, and the number and amount of such taxes as are due and unpaid.

### **Probate fees.**

§ 15. The fees of courts of probate for the duties required of them by this act shall be for each order, appointment, decree, judgment or approval of inventory or report required hereunder, one dollar; for the filing and endorsement of each paper, and for copies of records, the fees that are now allowed by law for the same. And the administrators, executors, trustees or other persons paying said tax shall be entitled to deduct the amount of all such fees paid to the court of probate from the amount of said tax to be paid to the treasurer of the state.

### **Final settlement of estate not to be allowed until.**

§ 16. No final settlement of the account of any executor, administrator or trustee, shall be accepted or allowed by any court of probate unless it shall show, and the judge of said court shall find, that all taxes imposed by the provisions of this act, upon any property or interest therein belonging to the estate to be settled by said account, shall have been paid, and the receipt of the treasurer of the state for such tax shall be the proper voucher for such payment.

### **Definitions.**

§ 17. In the foregoing act the word "person" shall be construed to include the plural as well as the singular, and artificial as well as natural persons; the word "property" shall be construed to include both real and personal estate, and any forms of interest therein whatsoever, including annuities; and the words "charitable purpose" shall be construed to include gifts to any educational, benevolent, ecclesiastical or missionary corporation, association or object.

Approved June 5, 1889.



## VIII. MARYLAND.

(a) MARYLAND CODE, VOL. 2, 1888, P. 1242.

COLLATERAL INHERITANCE TAX.<sup>1</sup>

§ 102. All estates, real, personal and mixed, money, public and private securities for money of every kind, passing from any person who may die seized and possessed thereof, being in this state, or any part of such estate or estates, money or securities, or interest therein, transferred by deed, will, grant, bargain, gift or sale, made or intended to take effect in possession after the death of the grantor, bargainor, deviser or donor, to any person or persons, bodies politic or corporate, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children and lineal descendants of the grantor, bargainor, testator, donor or intestate, shall be subject to a tax of two and a half per centum on every hundred dollars of the clear value of such estates, money or securities; and all executors and administrators shall only be discharged from liability for the amount of such tax, the payment of which they may be charged with, by paying the same for the use of this state, as hereinafter directed; provided, that no estate which may be valued at a less sum than five hundred dollars, shall be subject to the tax imposed by this section.<sup>2</sup>

§ 103. Every executor or administrator, to whom administration may be granted, before he pays any legacy, or distributes the shares of any estate liable to the tax imposed by the preceding section, shall pay to the register of wills of the proper county or city, two and a half per centum of every hundred dollars he may hold for distribution among the distributees or legatees, and at that rate for any less sum, for the use of the state; this section shall not be construed so as to release any tax already fixed on any collateral inheritance, distributive share or legacy.<sup>3</sup>

<sup>1</sup> Pub. Gen. Laws 1860, art. 81, § 124; Id. 1844, c. 237, § 1; Id. 1864, c. 200; Id. 1874, c. 483, § 113; Id. 1880, c. 444.

<sup>2</sup> State v. Dorsey, 6 Gill, 388; Tyson v. State, 28 Md. 577; Citizens' Nat. Bank v. Sharp, 53 Md. 521; Pub. Gen. Laws 1860, art. 81, § 125; Id. 1844, c. 237, § 2; Id. 1864, c. 200; Id. 1874, c. 483, § 114.

<sup>3</sup> State v. Dorsey, 6 Gill, 388; Pub. Gen. Laws 1860, art. 81, § 126; Id. 1844, c. 237, § 2; Id. 1874, c. 483, § 115.

§ 104. When any species of property other than money or real estate shall be subject to said tax, the tax shall be paid on the appraised value thereof as filed in the office of the register of wills of the proper county or city; and every executor shall have power under the order of the orphans' court, to sell, if necessary, so much of said property as will enable him to pay said tax.<sup>4</sup>

§ 105. Every executor or administrator shall, within thirteen months from the date of his administration, pay said tax on distributive shares and legacies in his hands, and on failure to do so, he shall forfeit his commissions.<sup>5</sup>

§ 106. In all cases where real estate of any kind is subject to the said tax, the orphans' court of the county in which administration is granted shall appoint the same persons, who may have been appointed to value the personal estate, to appraise and value all the real estate of the deceased within the state.<sup>6</sup>

§ 107. The form of the warrant to such appraisers shall be the same as to appraisers of personal property, except that the words "real estate" shall be inserted therein instead of the words "goods, chattels and personal estate," and the words "price of property" instead of the word "article," and the appraisers shall take the oath prescribed for appraisers of personal estate, except that the words "real estate" shall be substituted for the words "goods, chattels and personal estate," and their duties and proceedings shall, in every respect, be the same as those of the appraisers of personal estate.<sup>7</sup>

§ 108. If the estate or property lies in more than one county, and it is not convenient for the appraisers to visit the other county, the court may appoint two appraisers in said county.<sup>8</sup>

§ 109. The inventory of the real estate shall be entirely separate and distinct from that of the personal estate.<sup>9</sup>

<sup>4</sup> Pub. Gen. Laws 1860, art. 81, § 127; Id. 1845, c. 202, § 1; Id. 1874, c. 483, § 116.

<sup>5</sup> Pub. Gen. Laws 1860, art. 81, § 128; Id. 1847, c. 222, § 1; Id. 1874, c. 483, § 117.

<sup>6</sup> Pub. Gen. Laws 1860, art. 81, § 129; Id. 1847, c. 222, § 1; Id. 1874, c. 483, § 118.

<sup>7</sup> Pub. Gen. Laws 1860, art. 81, § 130; Id. 1847, c. 222, § 1; Id. 1874, c. 483, § 119.

<sup>8</sup> Pub. Gen. Laws 1860, art. 81, § 131; Id. 1847, c. 222, § 1; Id. 1874, c. 483, § 120.

<sup>9</sup> Pub. Gen. Laws 1860, art. 81, § 132; Id. 1847, c. 222, § 1; Id. 1874, c. 483, § 121.

§ 110. On the death or refusal of any appraiser to act, the court may appoint another in his place.<sup>10</sup>

§ 111. The appraisers shall return the inventory, when completed, to the executor or administrator, whose duty it shall be to return the same to the office of the register of wills, to which the inventory of the personal estate is returnable, and within the same time and under like penalty, and shall make oath that said inventory or inventories is or are a true and perfect inventory or inventories of all the real estate of the deceased, within this state, that has come to his knowledge, and that, should he thereafter discover any other real estate belonging to the deceased, in this state, he will return an additional inventory thereof.<sup>11</sup>

§ 112. The appraisement thus made shall be deemed and taken to be the true value of the said real estate, upon which the said tax shall be paid.<sup>12</sup>

§ 113. The amount of said tax shall be a lien on said real estate from the death of the decedent, who shall have died seized and possessed thereof, until the same shall be paid.<sup>13</sup>

§ 114. The executor or administrator shall collect the same from the parties liable to pay said tax, or their legal representatives, within thirteen months from the date of his administration, and pay the same to the register of wills of the county or city in which administration is granted; and if the said parties shall neglect or fail to pay the same within that time, the orphans' court of said county shall order the executor or administrator to sell for cash so much of said real estate as may be necessary to pay said tax and all the expenses of said sale, including the commissions of the executor or administrator thereon; and after the report of said sale, the ratification thereof and the payment of the purchase money, the executor or administrator may execute a valid deed of the estate sold and not before.<sup>14</sup>

§ 115. Whenever any estate, real, personal or mixed, of a decedent, shall be subject to the tax mentioned in the thir-

<sup>10</sup> Pub. Gen. Laws 1860, art. 81, § 133; Id. 1847, c. 222, § 3; Id. 1874, c. 483, § 122.

<sup>11</sup> Pub. Gen. Laws 1860, art. 81, § 134; Id. 1847, c. 222, § 4; Id. 1874, c. 483, § 123.

<sup>12</sup> Pub. Gen. Laws 1860, art. 81, § 135; Id. 1844, c. 237, § 5; Id. 1846, c. 344, § 2; Id. 1874, c. 483, § 124.

<sup>13</sup> Pub. Gen. Laws 1860, art. 81, § 136; Id. 1847, c. 222, § 5; Id. 1874, c. 483, § 125.

<sup>14</sup> Pub. Gen. Laws 1860, art. 81, § 137; Id. 1846, c. 344, § 1; Id. 1847, c. 222, § 6; Id. 1874, c. 483, § 126; Id. 1880, c. 455.

teen preceding sections, and there be a life estate, or interest for a term of years, or a contingent interest given to one party, and the remainder or reversionary interest to another party, the orphans' court of the county or city in which the administration is granted, shall determine in its discretion, and at such time as it shall think proper, what proportion the party entitled to said life estate, or interest, for a term of years, or contingent interest, shall pay of said tax; and the judgment of said court shall be final and conclusive; and the party entitled to said life estate, or interest for a term of years, or other contingent interest, shall, within thirty days after the date of such determination, pay to the register of wills his proportion of said tax; and thereafter the said court shall, from time to time, after the determination of the preceding estate, and as the remainder of said estate shall vest in the party or parties entitled in remainder or reversion, determine, in its discretion, what proportion of the residue of said tax shall be paid by the party or parties in whom the estate shall so vest; and the judgment of said court shall be final and each of the parties successively entitled in remainder or reversion shall pay his proportion of said tax to the register of wills within thirty days after the date of such determination as to him; and the amount of said tax shall be and remain a lien upon such estate until the same shall be paid.<sup>15</sup>

§ 115½. Whenever an interest in any estate, real, personal or mixed, less than any absolute interest, shall be devised or bequeathed to or for the use and benefit of any person or object, not exempt from the tax under section 102 of this article, then only such interest so devised or bequeathed shall be liable for said tax; and it shall be the duty of the orphans' court of the county or city in which administration is granted, or any other court assuming jurisdiction over such administration, to determine as soon after administration is granted as possible, on application of such person or object, the value of such interest liable for said tax, by deducting from the whole value of the estate so much thereof as shall be the value of the interest therein of any person who, under said section 102 of this article, is exempt from said tax, and the residue thereof shall be the value of said interest upon which said tax is payable; and said tax so ascertained, shall be paid by such person or object within

<sup>15</sup> Tyson v. State, 28 Md. 577; Pub. Gen. Laws 1860, art. 81, § 138; Id. 1847, c. 222, § 6; Id. 1874, c. 483, § 127.

90 days from such ascertainment, with interest thereon at 6 per cent. per annum, after the expiration of twelve (12) months from the death of the decedent, under whose will, or by whose intestacy said interest is acquired, if said tax has not sooner been paid, or within 90 days from the time that it shall be ascertained that such person or object shall be entitled to any such interest in any estate; but such tax shall bear interest at the rate of 6 per cent. per annum from the expiration of twelve (12) months from said death; but if such person or object shall fail to pay said tax, as above provided, then such person, or object shall at the time when he, she or it, comes into possession of such estate, pay a tax as provided for in said section 102, on the whole value thereof. [As added by chapter 493, Laws Md. 1894.]

§ 116. If any of the parties mentioned in the last preceding section, shall refuse or neglect to pay the several proportions, so decreed by the orphans' court, within thirty days from the time of such decree, the court shall order and direct the executor or administrator to sell all the right, title and interest of such party in and to said estate or property, or so much thereof as the court may deem necessary to pay his proportion of said tax and all expenses of sale.<sup>16</sup>

§ 117. The bond of an executor or administrator shall be liable for all money he may receive under this article of taxes, or for the proceeds of the sales of real estate received by him thereunder.<sup>17</sup>

§ 118. If any executor or administrator shall fail to perform any of the duties imposed upon him by this article, the orphans' court of the county in which the administration was granted, may revoke his administration, and his bond shall be liable, and the same proceedings shall be had against him as if his administration had been revoked for any other cause.<sup>18</sup>

§ 119. The power and duties of an administrator de bonis non, or with the will annexed, shall be the same under this article as those of an executor or administrator, and he shall be subject to the same liabilities.<sup>19</sup>

<sup>16</sup> Pub. Gen. Laws 1800, art. 81, § 139; Id. 1847, c. 222, § 7; Id. 1874, c. 483, § 128.

<sup>17</sup> Pub. Gen. Laws 1860, art. 81, § 140; Id. 1847, c. 222, § 8; Id. 1874, c. 483, § 129.

<sup>18</sup> Pub. Gen. Laws 1860, art. 81, § 141; Id. 1847, c. 222, § 9; Id. 1874, c. 483, § 130.

<sup>19</sup> Pub. Gen. Laws 1860, art. 81, § 142; Id. 1847, c. 222, § 10; Id. 1874, c. 483, § 131.

§ 120. In all cases where any estate, real, personal or mixed, shall be subject to the collateral inheritance tax imposed by this article, and no administration is taken out on the estate of the person who died seized and possessed thereof, within ninety days after the death of said person, the orphans' court of the county in which such administration should be granted, shall issue a summons for the parties entitled to administration to show cause wherefore they do not administer.<sup>20</sup>

Provided however that when any real estate shall be subject to said tax, and no administration has been taken on the estate of the person who died seized thereof; the orphans' court of the county where said real estate shall be situate, may on the application of any one interested in said real estate appoint appraisers to value the same as provided by the preceding section of this article, and the amount of said tax may be paid to the register of wills of the county when the said application shall be paid. [Section 120 as amended by Laws 1892, c. 473.]

§ 121. If the parties entitled by law to administration do not administer within a reasonable time to be fixed by the said court, or if they be incapable, or being capable, they decline or refuse to appear on proper summons or notice, administration shall be granted to such person as the court may deem proper.<sup>21</sup>

§ 122. In all cases where application is made to the orphans' court or register of wills of any county or the city of Baltimore, for letters testamentary or of administration, the said court or register shall inquire of the person making the application whether he knows or believes that there is any real estate of the decedent liable to the collateral inheritance tax, and the answer of such applicant shall be given on oath if the court or register requires it.<sup>22</sup>

§ 123. The register of wills shall give to the person paying the collateral inheritance tax imposed by this article, duplicate receipts for said tax, one of which shall be forwarded by said person to the treasurer, to be by him pre-

<sup>20</sup> Pub. Gen. Laws 1860, art. 81, § 143; Id. 1847, c. 222, § 10; Id. 1874, c. 483, § 132.

<sup>21</sup> Pub. Gen. Laws 1860, art. 81, § 144; Id. 1847, c. 222, § 10; Id. 1874, c. 483, § 133.

<sup>22</sup> Pub. Gen. Laws 1860, art. 81, § 145; Id. 1844, c. 184, § 4; Id. 1874, c. 483, § 134.

served, and copies thereof shall be evidence in suit upon the bond of said register.<sup>23</sup>

§ 124. It shall be the duty of the several clerks and the several registers of wills in this state to account with and pay to the treasurer, on the first Monday of March, June, September and December, in each and every year, all sums of money received by them respectively, for which they shall be allowed a commission of five per centum upon the amount so paid over.<sup>24</sup>

§ 125. If any of the said clerks or registers shall fail to account and pay over as required in the preceding section, the comptroller shall, in thirty days thereafter, give notice thereof to the state attorney for the county or city whose duty it shall be to put the bond of such clerk or register in suit for the use of the state, in which suit a recovery shall be had for the amount appearing to be due, with interest at the rate of 10 per cent. per annum, from the date or dates when the same is payable as aforesaid, which recovery shall be evidence of misbehavior, and upon conviction thereof the said clerk or register shall be removed from office, which shall thereupon be filled as prescribed by the constitution; and such failure on the part of any clerk or register shall amount to a forfeiture of the commission to which he would otherwise be entitled.

<sup>23</sup> Pub. Gen. Laws 1860, art. 81, § 146; Id. 1845, c. 71, § 3; Id. 1847, c. 222, § 12; Id. 1862, c. 157; Id. 1868, c. 196; Id. 1874, c. 483, § 135.

<sup>24</sup> Banks v. State, 60 Md. 305; Pub. Gen. Laws 1860, art. 81, § 147; Id. 1845, c. 71, §§ 2, 3; Id. 1847, c. 222, § 12; Id. 1868, c. 196; Id. 1874, c. 483, § 136.

## IX. CALIFORNIA.

(a) LAWS 1893, CH. CLXVIII, WITH AMENDMENTS TO 1895.

An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection, and to direct the disposition of the proceeds.

Approved March 23, 1893, and amended by chapter 28, Laws 1895.

The people of the state of California, represented in senate and assembly, do enact as follows:

§ 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of California, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations, and institutions now exempted by law from taxation, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the state; and all administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed; provided, that an estate which may



be valued at a less sum than five hundred dollars shall not be subject to such duty or tax.

§ 2. When any grant, gift, legacy, or succession upon which a tax is imposed by section one of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised, immediately after the death of the decedent and the market value thereof determined, in the manner provided in section eleven of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided, that the person or persons, or body politic or corporate, beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, and in that case such person or persons, or body politic or corporate, shall execute a bond to the people of the state of California, in a penalty of twice the amount of the tax arising upon personal estate, with such sureties as the said superior court may approve, conditioned for the payment of said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the county clerk of the proper county; provided further, that such person shall make a full and verified return of such property to said court, and file the same in the office of the county clerk within one year from the death of the decedent, and within that period enter into such security, and renew the same every five years. [Chapter 28, Laws 1895, amending section 2.]

§ 3. Whenever a decedent appoints or names one or more executors or trustees, and makes a bequest or devise of property to them in lieu of commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devises, or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to said tax; and the superior court in which the probate proceedings are pending shall fix the compensation.

§ 4. All taxes imposed by this act, unless otherwise herein

provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof a discount of five per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section two of this act for the payment of said tax, together with interest.

§ 5. The penalty of ten per centum per annum imposed by section four hereof, for the non-payment of said tax, shall not be charged in case where, by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent; and in such cases only seven per centum per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed.

§ 6. Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon upon the market value thereof from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax therefrom, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator, or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require. [Laws 1895, c. 28, § 6.]

§ 7. All executors, administrators, and trustees shall have full power to sell so much of the property of the decedent

as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of the estate, and the amount of said tax shall be paid as hereinafter directed.

§ 8. Every sum of money retained by an executor, administrator, or trustee, or paid into his hands, for any tax on property, shall be paid by him within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending, and the said treasurer shall give, and every executor, administrator, or trustee shall take duplicate receipts for such payment, one of which receipts said executor, administrator, or trustee shall immediately send to the controller of the state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall seal said receipt with the seal of his office, and countersign the same, and return it to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; and an executor, administrator, or trustee shall not be entitled to credits in his accounts, nor be discharged from liability for such tax, nor shall said estate be distributed unless he shall produce a receipt so sealed and countersigned by the controller, or a copy thereof, certified by him.

§ 9. Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir, or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator, or trustee, if the said tax has not been paid to the county treasurer or to the state controller, or by them, if it has been so paid.

§ 10. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state standing in the name of a decedent, or held in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasurer of the proper county, on the transfer thereof; otherwise the corporation permitting such transfer shall become liable to pay such tax; provided, that such corporation had knowledge before such transfer that said stocks or loans are liable to said tax.

§ 11. When the value of any inheritance, devise, bequest, or other interest subject to the payment of said tax is uncertain, the superior court in which the probate proceedings

are pending, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser, as often as and whenever occasion may require, whose duty it shall be forthwith to give such notice, by mail, to all persons known to have or claim an interest in such property, and to such persons as the court may by order direct, of the time and place at which he will appraise such property, and at such time and place to appraise the same, and make a report thereof, in writing, to said court, together with such other facts in relation thereto as said court may by order require, to be filed with the clerk of such court; and from this report the said court shall, by order, forthwith assess and fix the market value of all inheritances, devises, bequests, or other interests, and the tax to which the same is liable, and shall immediately cause notice thereof to be given, by mail, to all parties known to be interested therein; and the value of every future, or contingent, or limited estate, income, or interest shall, for the purposes of this act, be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum; and the insurance commissioner shall, on the application of said court, determine the value of such future, or contingent, or limited estate, income, or interest, upon the facts contained in such report, and certify the same to the court, and his certificate shall be conclusive evidence that the method of computations adopted therein is correct. The said appraiser shall be paid by the county treasurer out of any funds that he may have in his hands on account of said tax, on the certificate of the court, at the rate of five dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses. [As amended by chapter 28, Laws 1895, § 11.]

§ 12. Any appraiser appointed by virtue of this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred and

fifty dollars nor more than five hundred dollars, or imprisoned in the county jail ninety days, or both, and in addition thereto the court shall dismiss him from such service.

§ 13. The superior court in the county in which is situate the real property of a decedent who was not a resident of the state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the court first acquiring jurisdiction hereunder shall retain the same, to the exclusion of every other.

§ 14. If it shall appear to the superior court, or judge thereof, that any tax accruing under this act has not been paid according to law, it shall issue a citation, citing the persons known to own any interest in or part of the property liable to the tax to appear before the court on a day certain, not more than ten weeks after the date of such citation, and show cause why said tax should not be paid. The service of such citation, and the time, manner, and proof thereof, and the hearing and determination thereon, and the enforcement of the determination or decree, shall conform to the provisions of chapter twelve, of title eleven, of part three of the Code of Civil Procedure; and the clerk of the court shall, upon the request of the district attorney or treasurer of the county, furnish without fee, one or more transcripts of such decree, and the same shall be docketed and filed by the county clerk of any county in the state, without fee, in the same manner and with the same effect as provided by section six hundred and seventy-four of said Code of Civil Procedure for filing a transcript of an original docket.

§ 15. Whenever the treasurer of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax to pay the same, he shall notify the district attorney of the proper county, in writing, of such failure to pay such tax, and the district attorney so notified, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding in the superior court in the proper county, as provided in section fourteen of this act, for the enforcement and collection of such tax. [As amended by chapter 28, Laws 1895, § 15.]

§ 16. The county clerk of each county shall, every three months, make a statement, in writing, to the county treas-

urer, of the property from which, or the party from which, he has reason to believe a tax, under this act, is due and unpaid.

§ 17. Whenever the superior court of any county shall certify that there was probable cause for issuing a citation, and taking the proceedings specified in section fifteen of this act, the state treasurer, shall pay, or allow to the treasurer of any county, all expenses incurred for services of citation, and his other lawful disbursements that have not otherwise been paid. [As amended by chapter 28, Laws 1895, § 15.]

§ 18. The county clerk of each county shall keep a book in which he shall enter the value of inheritances, devises, bequests and other interests subject to the payment of said tax, and the tax assessed thereon, and the amounts of any receipts for payments thereon filed with him, which books shall be kept by him as public records.

§ 19. The treasurer of each county shall collect and pay the state treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor, of which collection and payment he shall make a report, under oath, to the controller, between the first and fifteenth days of May and December of each year, stating for what estate paid, and in such form and containing such particulars as the controller may prescribe; and for all such taxes collected by him and not paid to the state treasurer by the first day of June and January of each year he shall pay interest at the rate of ten per centum per annum.

§ 20. The treasurer of each county shall be allowed to retain, on all taxes paid and accounted for by him each year, under this act, in addition to his salary or fees now allowed by law, five per centum on the first fifty thousand dollars so paid and accounted for by him, three per centum on the next fifty thousand dollars so paid and accounted for by him, and one per centum on all additional sums so paid and accounted for by him.

§ 21. Any person, or body politic or corporate, shall, upon payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county, or a copy of the receipt, at his option, that may have been given by said treasurer for the payment of any tax under this act, to be sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any decedent may have died seized, said tax has been paid, and by whom

paid, and whether or not it is in full of said tax; and said receipt may be recorded in the clerk's office in the county in which said property is situate, in a book to be kept by said clerk for such purpose, which shall be labeled "Collateral Tax."

§ 22. All taxes levied and collected under this act shall be paid into the treasury of the state, for the uses of the state school fund.

§ 23. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

## X. ILLINOIS.

[Taken from Laws of Illinois, by James B. Bradwell, Chicago Legal News Co., Chicago, 1895, p. 213; compared with Laws Ill. 1895, Reg. & Ex. Sess. p. 301.]

An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same. Approved June 15, 1895. In force July 1, 1895.

### 307. Rate of tax.

§ 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, all property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county, for the use of the state; and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter or any child or children adopted as such in conformity with the laws of the state of Illinois or to any person to whom the deceased, for not less than ten years prior to death stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock; in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person and at and after the same rate for every less amount,



provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes; and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, in every such case the rate of such tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person. In all other cases the rate shall be as follows: On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars, on all estates over twenty thousand, and not exceeding fifty thousand, five dollars; and on all estates over fifty thousand dollars, six dollars: provided that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

**308. Lineal descendant—Life estate or for term of years—Rule as to taxation—Bond.**

§ 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid: provided, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come in the actual possession or

enjoyment of such property, or, in that case said person or persons or body politic or corporate shall give a bond to the people of the state of Illinois in the penalty of three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax and interest thereon at such time or period as they or their representatives may come into the actual possession or enjoyment of said property; which bond shall be filed in the office of the county clerk of the proper county: provided further, that such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years.

### **309. Taxes—When payable—Penalty.**

§ 3. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent and interest at the rate of six per cent per annum shall be charged and collected thereon for such time as said taxes is not paid: provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of five per cent shall be allowed and deducted from said tax, and in all cases where the executors, administrators or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section 2 of this act for the payment of said tax, together with interest.

### **310. Inheritance tax—When, how and by whom paid.**

§ 4. Any administrator, executor or trustee having any charge or trust in legacies or property for distribution subject to the said tax shall deduct the tax therefrom, or if the legacy or property be not money he shall collect a tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate the heir or devisee before paying the same shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee, and the

same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the said payment of said legacies might be enforced, if, however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money he shall make application to the court having jurisdiction of his accounts, to make an apportionment if the case requires it of the sum to be paid into his hands by such legatees, and for such further order relative thereof as the case may require.

### **311. Powers of executors and administrators.**

§ 5. All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled to do by law for the payment of duties of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

### **312. Tax to be paid to treasurer—Sealed receipt.**

§ 6. Every sum of money retained by any executor, administrator or trustee, or paid into his hands for any tax on any property, shall be paid by him within thirty days thereafter to the treasurer of the proper county, and the said treasurer or treasurers shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of said payments, one of which receipts he shall immediately send to the state treasurer, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and shall seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlements of his accounts; but the executor, administrator or trustee shall not be entitled to credit in his accounts or be discharged from liability for such tax unless he shall purchase a receipt so sealed and countersigned by the treasurer and a copy thereof certified by him.

### **313. When real estate liable to tax — Duty of executor — Information in writing to the treasurer.**

§ 7. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corpo-

rate, or to any person or persons, or in trust for them, or some of them, it shall be the duty of the executor, administrator or trustee of such decedent to give information thereof in writing to the treasurer of the county where said real estate is situated, within six months after they undertake the execution of their expected duties, or if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

**314. When portion of tax repaid to legatee—Who has to refund a portion of the legacy.**

§ 8. Whenever debts shall be proved against the estate of the decedent after distribution of legacies from which the inheritant [inheritance] tax has been deducted in compliance with this act, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the state or county treasury, or by the county treasurer if it has been so paid.

**315. Foreign executor or administrator—Property in this state.**

§ 9. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state standing in the name of decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasury or treasurer of the proper county on the transfer thereof, otherwise the corporation forming such transfer shall become liable to pay such taxes, provided that such corporation has knowledge before such transfer that said stocks or loans are liable to such taxes.

**316. When tax paid erroneously.**

§ 10. When any amount of said tax shall have been paid erroneously to the state treasury, it shall be lawful for him on satisfactory proof rendered to him by said county treasurer of said erroneous payments to refund and pay to the executor, administrator or trustee, person or persons who have paid any such tax in error the amount of such tax so paid, provided that all applications for the repayment of said tax shall be made within two years from the date of said payment.

**317. How value of property fixed.**

§ 11. In order to fix the value of property of persons whose estate shall be subject to the payment of said tax, the county judge, on the application of any interested party or upon his own motion, shall appoint some competent person as appraiser as often as or whenever occasion may require, whose duty it shall be forthwith to give such notice by mail to all persons known to have or claim an interest in such property and to such persons as the county judge may by order direct of the time and place he will appraise such property, and at such time and place to appraise the same at a fair market value; and for that purpose the appraiser is authorized by leave of the county judge to use subpoenas for and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make a report thereof and of such value, in writing, to said county judge, with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as said county judge may by order require to be filed in the office of the clerk of said county court; and from this report the said county judge shall forthwith use and fix the then cash value of all estates, annuities, and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice by mail to all parties known to be interested therein. Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment on paying the given security proof to the county judge to pay all costs, together with whatever taxes that shall be fixed by said court. The said appraiser shall be paid by the county treasurer out of any funds he may have in his hands on account of said tax, on the certificate of the county judge, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses.

**318. Appraisers taking fee or reward—Penalty.**

§ 12. Any appraiser appointed by this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any

other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars and imprisoned not exceeding ninety days; and in addition thereto the county judge shall dismiss him from such service.

### **319. Jurisdiction of county court.**

§ 13. The county court in the county in which the real property is situated of the decedent who was not a resident of the state or in the county of which the deceased was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the county court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.

### **320. Proceedings when tax has not been paid.**

§ 14. If it shall appear to the county court that any tax accruing under this act has not been paid according to law, it shall issue a summons summoning the persons interested in the property liable to the tax to appear before the court on a day certain not more than three months after the date of such summons, to show cause why said tax should not be paid. The process, practice and pleadings, and the hearing and determination thereof, and the judgment in said court in such cases shall be the same as those now provided, or which may hereafter be provided in probate cases in the county courts in this state and the fees and costs in such cases shall be the same as in probate cases in the county courts of this state.

### **321. Duty of officers when tax not paid.**

§ 15. Whenever the treasurer of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the person interested in the property liable to pay said tax to pay the same, he shall notify the state's attorney of the proper county, in writing, of such refusal to pay said tax, and the state's attorney so notified, if he has proper cause to believe a tax is due and unpaid, shall prosecute the proceeding in the county court in the proper county, as provided in section 14 of this

act, for the enforcement and collection of such tax, and in such case said court shall allow as costs in the said case such fees to said attorney as he may deem reasonable.

### **322. Statement in writing.**

§ 16. The county judge and county clerk of each county shall, every three months, make a statement in writing to the county treasurer of the county of the property from which or the party from whom he has reason to believe a tax under this act is due and unpaid.

### **323. Expenses of proceedings.**

§ 17. Whenever the county judge of any county shall certify that there was probable cause for issuing a summons and taking the proceedings specified in section fourteen of this act the state treasurer shall pay or allow to the treasury of any county all expenses incurred for service of summons and his other lawful disbursements that has not otherwise been paid.

### **324. Book to be kept in the office of the county judge.**

§ 18. The treasurer of the state shall furnish to each county judge a book in which he shall enter the returns made by appraisers, the cash value of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon and the amounts of any receipts for payments thereof filed with him, which books shall be kept in the office of the county judge as a public record.

### **325. Treasurer to pay the state treasurer all taxes.**

§ 19. The treasurer of each county shall collect and pay the state treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor, of which collection and payment he shall make a report under oath to the auditor of public accounts on the first Monday in March and September of each year, stating for what estate paid and in such form and containing such particulars as the auditor may prescribe; and for all said taxes collected by him and not paid to the state treasurer by the first day of October and April of each year, he shall pay interest at the rate of ten per cent. per annum.

**326. Treasurer's commission or salary.**

§ 20. The treasurer of each county shall be allowed to retain two per cent. on all taxes paid and accounted for by him under this act in full for his services in collecting and paying the same in addition to his salary or fees now allowed by law.

**327. Receipt.**

§ 21. Any person or body politic or corporate shall upon the payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county or the copy of the receipt, at his option, that may have been given by said treasurer for the payment of any tax under this act, to be sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any deceased may have died seized, said tax has been paid and by whom paid, and whether or not it is in full of said tax and said receipt may be recorded in the clerk's office of said county in which the property may be situated in the book to be kept by said clerk for such purpose.

**328. Lien of the collateral inheritance tax.**

§ 22. The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied: provided, that said lien shall be limited to the property chargeable therewith: and, provided further that all inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to be paid and cease to be a lien as against any purchasers of real estate.

**329. Repeal.**

§ 23. All laws or parts of laws inconsistent herewith be, and the same are, hereby repealed.



# APPENDIX OF FORMS

USED UNDER THE NEW YORK STATUTE.\*

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- I. Petition of District Attorney to Enforce Payment.
- II. Petition of Executor, etc., for Appraiser.
- III. Petition of County Treasurer or Comptroller in New York City.
- IV. Order for Citation.
- V. Citation.
- VI. Order Appointing Appraiser.
- VII. Notice of Appraisement.
- VIII. Appraiser's Report.
- IX. Surrogate's Notice of Assessment.
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## I.

### PETITION OF DISTRICT ATTORNEY TO ENFORCE PAYMENT.

Surrogate's Court, New York County.

In the Matter of the Estate }  
                                  of }  
\_\_\_\_\_, Deceased. }

To the Surrogate's Court of the City and County of New York.

The petition of J. R. F., of the city of New York, respectfully shows:

I. That your petitioner is the district attorney of the city and county of New York.

\* These forms may be modified to conform to the facts in each case. For a list of forms, see, also, In re Astor (Surr.) 2 N. Y. Supp. 630; Redf. Surr. Prac. (5th Ed.) p. 1001.

II. That on or about the ——— day of ———, 1895, at the city of New York, ——— died, and was at the time of h—— death a resident of the city and county of New York.

III. That said deceased left a last will and testament dated ———, 18—, which was duly admitted to probate in the office of the surrogate of the county of New York, on the ——— day of ———, 18—, wherein and whereby he appointed ———, who duly qualified as such, and said letters are still in force.

IV. That said decedent died seized or possessed of property within this state, or subject to its laws, the value of which exceeded the sum of five hundred dollars.

V. That upon the death of said ——— certain of the property of said decedent thereupon passed to ———.

VI. That none of the persons designated in the foregoing paragraph, No. V. of this petition, is a person or corporation exempt by law from taxation.

VII. That the property so passing, or some part thereof, is subject to taxation under chapter 399 of the Laws of this state, passed April 30, 1892, entitled "An act in relation to taxable transfers of property."

The foregoing allegations are made on information and belief.

VIII. Your petitioner further shows that the comptroller of the city and county of New York [or the county treasurer of the county of ———] has notified your petitioner in writing of the refusal or neglect of the persons liable therefor to pay the said tax, and that no part of said tax has been paid, and your petitioner has probable cause to believe that the same still remains due and unpaid.

Wherefore, your petitioner prays that a citation issue herein to ———, citing ——— to appear before this court on a day to be designated therein, and show cause why the tax under the act aforesaid should not be paid, and said property be appraised if necessary for that purpose.

Dated the ——— day of ———, 1895.

\_\_\_\_\_,  
District Attorney of the City and County of New York.

State of New York, }  
City and County of New York. } ss.

John R. Fellows, being duly sworn, says, that he has read the foregoing petition and knows the contents thereof, and that the same is true to the knowledge of deponent, except

as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this—— }  
day of ——, 1895.

## II.

### PETITION OF EXECUTOR, ETC., FOR APPRAISER.

[Title.]

To ——, Surrogate.

The petition of A. respectfully shows:

First. Your petitioner is the executor named in the last will and testament of the decedent, and as such is a person interested in the estate of the above named decedent.

Second. That the said decedent departed this life on the —— day of 1895, in the city of ——, and that he was a resident [*or*, non-resident] of this state.

Third. That said decedent left a last will and testament, which was on the —— day of —— duly admitted to probate, and that —— are the executors of said will and their post-office addresses are: [naming them.]

Fourth. That, as your petitioner is informed and believes, the property of said decedent, passing by said will, or some portion thereof, or some interest therein, is subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all the persons who are interested in said estate and who are entitled to notice of all proceedings herein, including the comptroller of the city of New York [*or*, county treasurer], and their post-office addresses, are as follows, viz.:

Wherefore, your petitioner prays that you will appoint some competent person as appraiser as provided by law.

And your petitioner will ever pray.

———, Petitioner.

[Verification.]

## III.

**PETITION OF COUNTY TREASURER OR COMPTROLLER IN NEW YORK CITY.**

[Under chapter 399, Laws N. Y. 1892, § 11, these officials are also authorized to make application for the appointment of an appraiser. After alleging the official title of the petitioner, the form may be made to conform to No. II.]

## IV.

**ORDER FOR CITATION.**

At a surrogate's court held at the office of the surrogate, in the county of ———, on the ——— day of ———, 18—.

Present: Hon. ———, Surrogate.

In the Matter of the Estate }  
of }  
—————, Deceased. }

On reading and filing the petition of ———, of the county of New York, verified the ——— day of ———, 18—. It is ordered, that a citation issue herein in accordance with the prayer of said petitioner.

—————, Surrogate.

## V.

**CITATION.**

The people of the state of New York, by the grace of God, free and independent. To ——— send greeting:

You and each of you are hereby cited and required personally to be and appear in the court of the surrogates of the city and county of New York, at the county court house, in said city, on the ——— day of ———, 1895, at ——— o'clock in the ———noon, to show cause why the tax imposed by chapter 399 of the Laws of 1892 of the state of New York should not be paid on property passing to you under the will of ———, deceased, proved herein by decree entered the ——— day of ———, 1895, and why such property should

not be appraised according to law, if necessary for that purpose.

And such of you hereby cited as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

In testimony whereof, we have caused the seal of the surrogate's court to be hereunto affixed.

Witness, ———, Esq., surrogate of our said county, at the city of New York, the ——— day of ———, in the year of our Lord, one thousand eight hundred and ninety-five.

\_\_\_\_\_  
Clerk of the Surrogate's Court.

## VI.

### ORDER APPOINTING APPRAISER.

[Caption.]

Estate of ———.

On reading and filing the petition of ———, praying for the appointment of some competent person as appraiser, under and pursuant to the law to tax transfers of property, in certain cases, it is

Ordered, that ———, Esq., be and he hereby is appointed such appraiser.

And it is further ordered, that said appraiser shall give the notice required by said law, in the manner and at the time therein set forth (and said notice shall be five days,) to the following persons, and to all other persons known to have or claim an interest in the property of the decedent in the above entitled proceeding, subject to the payment of said tax; viz.: [*Here take in names of persons, corporations, and public officials to be served with notice.*]

## VII.

**NOTICE OF APPRAISEMENT.**

Surrogate's Court, County of New York.

In the Matter of the Estate	}	Transfer Tax.
of		
A., Deceased.		

You will please to take notice that, by virtue of an order of Hon. ———, surrogate of the county of New York, made and dated the ——— day of ———, 1895, and pursuant to the provisions of chapter 399 of the Laws of 1892, entitled "An act in relation to taxable transfers of property," I shall, on the ——— day of ———, 1895, at ——— o'clock in the ———noon of that day, at the office of ———, No. ——— street, in the city of New York, proceed to appraise at its fair market value, all the property of said ———, deceased, late of said city, passing by his last will and testament or by the intestate laws of the state of New York, which is subject to the payment of the tax imposed by the said act.

New York, ———, 1895.

—————, Appraiser.

To ———.

## VIII.

**APPRAISER'S REPORT.<sup>1</sup>**

Surrogate's Court, County of New York.

In the Matter of the Estate	}	Transfer Tax.
of		
A., Deceased.		

To the Surrogate's Court, County of New York.

I, the undersigned, who was, by an order, made and entered on the ——— day of ———, 1895, appointed appraiser, under and in pursuance of the law in relation to the taxable transfers of property, a certified copy of which order is hereto attached, respectfully report:

First. That forthwith after my said appointment I took

<sup>1</sup> This form was used in *Re Minturn*, 3 N. Y. Law J. 804, and is given more in detail for its practical use.

and subscribed the oath hereto attached, and I gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property subject to the tax imposed by said law, and to the following named persons, being those named by the surrogate in the said order, of the time and place I would appraise the property of A., deceased, subject to the payment of said tax; a true copy of said notice is also hereto attached, viz.: [*Here take in names of all persons entitled to notice and notified.*]

Second. I further report, that at the time and place in said notice stated, to wit, on the ——— day of ———, 18—, at No. ———, in the city of New York, and at other and subsequent times and at divers places, I appraised all the property of said ———, deceased, now subject to the payment of said tax, at its fair market value, as follows, to wit:<sup>2</sup>

A legacy in cash of \$5,000 payable on the death of decedent's wife who, at the time of his death, was of the age of 78 years and 7 months, the present value of said sum of \$5,000 being . . . . . \$4,166.66 bequeathed to [*giving in succession the name of each legatee, and particulars as to estate taken under the will, or by law in cases of intestacy*].

\* \* \* \* \*

———, the testator, by his will, among other things, directs his executors on the death of his wife to pay out of his residuary estate certain sums of money to individuals therein named; and in case of the death of any said persons before his wife, or before he or she shall become entitled to said sum of money, then such sum is to be paid to the issue of the one so dying, and failing such issue, becomes part of the residue of the estate of decedent which, under his will is bequeathed to his son ———, and who, if he should predecease decedent's wife has a power of appointment, by a will, of such residue. The names of such persons together with sums respectively bequeathed to them and the present values thereof at the time of decedent's death are as follows:

\* \* \* \* \*

In the event of any of said persons or their issue becoming entitled to such property above mentioned, the present cash values thereof as above appraised will then become subject

<sup>2</sup> This clause should contain a minute description of the property appraised, name of owner or person interested therein, and his post-office address, and the fair market value of such property.

to the payment of the tax imposed by said act, but the liability to such payment cannot now be determined.

The following are the appearances before the appraiser: The executors, by ———, attorneys, who object to any appraisal of the property passing to the corporations mentioned in the will, on the ground that the life tenant (decedent's wife) is not dead, and that the tax, if any, on said property is not payable until after her death; and also that the legacies to individuals named in the will, and payable on the death of decedent's wife, cannot now be taxed on the ground that such persons may never become entitled thereto, and which cannot be determined until the death of the life-tenant, &c.

\* \* \*

All of which is respectfully submitted.

Dated New York, ———, 18—.

—————, Appraiser.

## IX.

### SURROGATE'S NOTICE OF ASSESSMENT.

Surrogate's Court, City and County of New York.

In the Matter of the Estate }  
                                   of }  
 —————, Deceased. }

You are hereby notified that at the surrogate's court of the city and county of New York, to be held on the ——— day of ———, 1895, at 10:30 a. m., at the county court house, in the city of New York, I shall, from the return and report of the appraiser filed herein on the ——— day of ———, 18—, assess and fix the cash value of all such interest, estate, annuity, legacy or property as you and each of you are given or entitled to receive from or out of the estate left by the said ———, deceased, and the amount of the tax to which the same is liable under chapter 399, Laws 1892.

Dated New York, ———, 1895.

—————, Surrogate.

To ———.



## X.

**DECREE FOR DISTRICT ATTORNEY ASSESS-  
ING AND FIXING TAX.**

At a surrogate's court, held in and for the county of New York, at the county court house, in the city of New York, on the ——— day of ———, 1894.

Present: Hon. ———, Surrogate.

In the Matter of the Estate }  
of }  
—————, Deceased. }

Upon reading and filing the report of ———, Esq., the appraiser herein, and after hearing ———, on behalf of Hon. John R. Fellows, district attorney, in support of said report, and ———, of counsel for the ——— herein, in opposition, it is

Ordered: 1st—That the cash value at the date of decedent's death, of the property and interests mentioned and described in said report, which are subject to the payment of the tax due, under the law in relation to taxable transfers of property, is as follows:

Interest of ..... \$ ———

2d—That the ——— herein, make payment to the comptroller of the city of New York, of the sum of ——— dollars (\$ ———), being the amount of the tax upon the interest of said ———, together with interest upon each of said sums, respectively, at the rate of ——— per centum per annum, from the ——— day of ———, 189—, to the date of payment.

And it is further ordered, that said ——— pay to Hon. ——— the sum of ——— dollars, as and for his costs and disbursements herein.

## XI.

**AFFIDAVIT FOR COSTS OF DISTRICT ATTORNEY.**

[Title.]

City and County of New York, ss.

——— being duly sworn, says, that he is ——— in the office of the district attorney for the county of New York, and as such has had charge of the above entitled proceeding, and is familiar with all the steps taken therein.

That this is a proceeding brought by the district attorney, under section 15 of chapter 399 of the Laws of 1892, to enforce payment of the transfer tax due under said chapter 399.

That in order to properly draw the petition in the above matter it was necessary for deponent to cause an examination to be made of the records in the surrogate's office of this county, and also of the will of said deceased, which was probated in said court, for the purpose of ascertaining the persons liable to pay the transfer tax; and upon the information so obtained, deponent drew the petition herein; applied for citation; procured an order therefor; had the citation served; filed the proper proofs to have the matter placed upon the calendar of this court upon the return day of said citation; and appeared in court on said return day.

Deponent verily believes that this is a proper case where a ——— allowance should be made to the district attorney, for costs, as provided by law.

Sworn to before me this ——— }  
day of ———, 1895. }

## XII.

## DECREE FOR EXECUTOR FIXING TAX.

Present: Hon. ———, Surrogate.

In the Matter of the Estate }  
                     of  
 —————, Deceased. }

On reading and filing the report of ———, Esq., the appraiser herein, Ordered,

First. The said report is in all respects confirmed.

Second. That the fair market value of the property mentioned and described in said report, which is subject to the payment of the tax imposed by the law in relation to the taxable transfers of property is as follows;

Interest of .....\$            
       "      " .....\$          

Third. That the amount of the tax to which the said property and interests are liable is as follows, viz.:

On interest of.....\$            
       "      " .....\$          

together with interest [or penalty where one is imposed] upon each of said sums, respectively, at the rate of ——— per centum per annum, from the ——— day of ———, 189—, to the date of payment.<sup>3</sup>

<sup>3</sup> Chapter 399, Laws 1892, § 13, provides for an appeal from these orders, which must be taken to the surrogate within 60 days after the order is filed. The grounds of appeal should be specifically stated, and no other grounds will be considered by the surrogate.

## XIII.

**NOTICE TO SUPERINTENDENT OF INSURANCE.**

Chambers of the Surrogate,  
New York County.

New York, ———, 1895.

Dear Sir:—In pursuance of chapter 399, Laws of 1892, you are hereby requested to determine and ascertain the values of the following estates, annuities and interests.

Name.	Age.	Legacy or Estate.	Value or Amount.	

To ———, Superintendent  
of the Insurance Department.

Yours respectfully,  
—————, Surrogate.

## XIV.

**SUPERINTENDENT'S REPORT.**

Insurance Department.

Estate of ———, Deceased.

Albany, N. Y., ———, 1895.

Sir:—In reply to your request of the ———, inst., I give below the present values desired:

Name.	Legacy.	P. V. at Date.

Very respectfully,  
—————, Superintendent.

To Hon. ———, Surrogate ——— County, N. Y. .

## XV.

## ANNUITY TABLE.

Table showing the value of an annuity of one dollar on a single life, according to the table published by Jenkins Jones, London, 1843, of mortality, at five per cent. interest. This table is employed by the insurance department.

Age.	No. of Years Purchase the Annuity is Worth	Age.	No. of Years Purchase the Annuity is Worth	Age.	No. of Years Purchase the Annuity is Worth	Age.	No. of Years Purchase the Annuity is Worth
1	\$11,563	31	\$12,965	61	\$8,181	91	\$1,447
2	13,420	32	12,854	62	7,966	92	1,153
3	14,135	33	12,740	63	7,742	93	816
4	14,613	34	12,623	64	7,514	94	524
5	14,827	35	12,502	65	7,276	95	238
6	15,041	36	12,377	66	7,034		
7	15,166	37	12,249	67	6,787	-	
8	15,226	38	12,116	68	6,536		
9	15,210	39	11,979	69	6,281		
10	15,139	40	11,837	70	6,023		
11	15,043	41	11,695	71	5,764		
12	14,937	42	11,551	72	5,504		
13	14,826	43	11,407	73	5,245		
14	14,710	44	11,258	74	4,990		
15	14,588	45	11,105	75	4,744		
16	14,460	46	10,947	76	4,511		
17	14,334	47	10,784	77	4,277		
18	14,217	48	10,616	78	4,035		
19	14,108	49	10,443	79	3,776		
20	14,007	50	10,269	80	3,515		
21	13,917	51	10,097	81	3,263		
22	13,833	52	9,925	82	3,020		
23	13,746	53	9,748	83	2,797		
24	13,658	54	9,567	84	2,627		
25	13,567	55	9,382	85	2,471		
26	13,473	56	9,193	86	2,328		
27	13,377	57	8,999	87	2,193		
28	13,278	58	8,801	88	2,080		
29	13,177	59	8,599	89	1,924		
30	13,072	60	8,392	90	1,723		

### RULES FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at 5 per cent. for one year upon the sum to the income of which the person is entitled. Multi-

ply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of each person in said sum.

Examples:

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{2}{3}$ . Interest on \$116.91 one year, at five per cent., is \$5.85. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 12 years and  $\frac{249}{1000}$  parts of a year, which, multiplied by \$5.85, the income for one year, gives \$61.75 and a fraction as the gross value of her right of dower.

Suppose a man, whose age is 50, is tenant by the curtesy in the whole of an estate worth \$9,000. The annual interest on the sum, at 5 per cent. is \$450. The number of years' purchase which an annuity of \$1 is worth, at the age of 50, as per table, is  $10\frac{269}{1000}$  parts of a year, which, multiplied by \$450, the value of one year, gives \$4,621.05 as the gross value of his life estate in the premises, or the proceeds thereof.

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